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CHILD SUPPORT ORDERS: THE FEDERAL-STATE PARTNERSHIP—PART I

Deborah H. Bell[*]

I. FEDERAL INVOLVEMENT IN CHILD SUPPORT

A parent's duty to support minor children was the exclusive province of the individual states until very recently. Child support awards were largely within the discretion of state family court judges. A court set awards by considering the child's needs; the financial resources of both parents; the standard of living of the intact family; the child's physical, emotional, and educational needs; and the noncustodial parent's needs.[1] As a result of this broad discretion, awards lacked consistency and predictability even within each state.[2] Of even greater concern, some single-parent households did not have support awards,[3] many of those who did had seriously inadequate awards,[4] and many had awards that were ignored, in arrears, or underpaid.[5] Concern over the lack of support for children in single-parent households and the wide variation in support orders prompted federal intervention in the 1970s. Over the next two decades, Congress enacted a series of laws resulting in an unprecedented federal presence in the traditionally state-governed area of family law.

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[1] *See* 2 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.1, at 360 (2d ed. 1987); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. § 400 (1987).

[2] *See* Kenneth R. White & R. Thomas Stone, Jr., *A Study of Alimony and Child Support Rulings with Some Recommendations*, 10 FAM. L.Q. 75-76, 83 (1976).

[3] *See* Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 326 (1991) (finding in 1984 that 39% of custodial parents had no child support award).

[4] *See* Lucy Marsh Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DEN. L.J. 21, 36 (1979) (noting that support orders are often lower than car payments).

[5] *See* CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMO-

This article is the first of a two-part article on child support awards and enforcement of awards in Mississippi. Part One discusses law regulating the initial award of child support, including a discussion of federally mandated guidelines for support orders, a general review of state responses, and a detailed focus on application of the guidelines in Mississippi. Part Two, which will be published in Volume 69, Issue 3 of the *Mississippi Law Journal*, discusses modification, termination, and enforcement of child support orders in Mississippi.

A. Federal Legislation

1. Title VI-D: Creation of State Enforcement Mechanisms

Initially, federal involvement in child support grew out of federal assistance to families through Title IV-A of the Social Security Act under the Aid to Families with Dependent Children program.[6] Instituted in the 1930s to provide for widows and their children, by the 1970s the program primarily supported children in female-headed households where the father was absent, not deceased.[7] As a corollary to AFDC, Congress in 1974 passed the Family Support Act, known as Title IV-D.[8] The Act was intended to offset the costs of AFDC by requiring states to collect child support from absent fathers of families

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NY: 1985 (Current Pop. Rep., Series P-23,. No. 154, 1989), *cited in* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, § 1.01, at 1-4, n.11 (1st ed. 1996 & Supp. 1999)). The report estimated that one quarter of custodial mothers received no support at all and only one-half received the full amount ordered. *Id.*

[6] 42 U.S.C. §§ 601-617 (1991 & Supp. 1999).

[7] It is estimated that 87% of AFDC recipients are eligible because of inadequate child support. FAMILY LAW AND PRACTICE, § 33.03[1], at 33-19 n.4. (Arnold H. Rutkin ed. 1999).

[8] Family Support Act, 42 U.S.C. §§ 651-669 (1994 & Supp. 1998).

supported by the program. Subsequently, the Child Support Enforcement Amendments of 1984[9] strengthened state IV-D child support efforts by authorizing more effective collection methods, including withholding child support from paychecks[10] and deducting child support from tax refunds.[11] Thus, the federal government's first attempts to enforce parental support obligations, like the Elizabethan poor laws, were directed at derelict parents whose children were supported by the state. The 1984 act also reflects federal concern about the inadequacy and inconsistency of awards. In addition to addressing enforcement and collection efforts, the 1984 Act requires states to promulgate advisory guidelines for child support awards in order to help remedy the inconsistency of awards.[12] However, because the guidelines were simply advisory judges still retained broad discretion to set awards.

2. *The Family Support Act: Requiring Mandatory Guidelines*

The most significant step affecting consistency of awards came in 1988 with the Family Support Act.[13] The FSA required that (1) states establish child support guidelines that operate as a rebuttable presumption regarding the proper support award, rather than as advisory standards; (2) the guidelines are rebuttable only upon a written finding that application would result in an unjust or inappropriate award; (3) states establish criteria to be used for deviation from the guidelines; and (4) states provide that the guidelines be used in actions to modify awards.[14] The Family Support Act of

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[9] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1315 (1984) (codified as amended at 42 U.S.C. §§ 651-58, 662, 664, 666 (1994)).

[10] 42 U.S.C. § 666(b)(1) (Supp. 1998).

[11] 42 U.S.C. § 664(a) (Supp. 1998); *see also* Diane Dodson & Robert M. Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 FAM. L. REP. (BNA) 3051 (1984) (explaining Child Support Enforcement Amendment's purposes).

[12] 42 U.S.C. § 667 (1994); 45 C.F.R. 302.56 (1999).

[13] 42 U.S.C. §§ 651-669.

[14] *See* 42 U.S.C. § 667 (providing for IV-D agency review and adjustment of support orders at least once every four years); 42 U.S.C. § 666(a)(10)(A)-(B) (1994)

1988 was the catalyst for a national overhaul of standards for child support awards. In a brief span of time, states discarded the subjective factors of "need" and "ability to pay" for structured guidelines conforming to the FSA mandate.

3. *Welfare Reform: Expanding Enforcement*

Subsequently, in 1996, as a part of welfare reform, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[15] PRWORA made substantial changes in child support enforcement proceedings by increasing or expanding federal tools for enforcement. The act established a "new hire" registry,[16] expanded the parent locator service,[17] created new paternity procedures,[18] required state inclusion of liens on business and professional licenses,[19] and required that each state adopt the Uniform Interstate Family Support Act (UIFSA).[20] UIFSA is designed to expedite enforcement of interstate child support orders through enhanced cooperation of courts and agencies across state lines.[21]

(providing review in both AFDC and non-AFDC support cases in which custodial parent seeks assistance of state IV-D agency); 42 U.S.C. § 653(a) (1994) (addressing enforcement by creating Federal Parent Locator Service).

In addition to the federally mandated guidelines, Congress in 1992 passed the "deadbeat dad" or Child Support Recovery Act, which created criminal liability for a parent who is more that $5000 in arrears in support or over one year in arrears. 18 U.S.C. § 228 (1994).

[15] 42 U.S.C. §§ 601-615 (replacing AFDC with Temporary Assistance to Needy Families (TANF) program); 42 U.S.C. § 608(a)(7) (Supp. 1998) (capping welfare assistance payments to family at five years under programs administered through block grants to states).

[16] 42 U.S.C. § 653(i) (Supp. 1998).

[17] *Id.*

[18] 42 U.S.C. § 666(a)(5) (1994).

[19] 42 U.S.C. § 666(a)(4), (16) (Supp. 1998).

[20] 42 U.S.C. § 666(f) (Supp. 1998).

[21] Part II of this article, "Child Support Enforcement, Modification and Termination," will discuss in detail the federally mandated enforcement mechanisms and state implementation of those mechanisms.

B. State Response to Mandated Guidelines

1. Federal Goals and Principles

While the Family Support Act of 1988 mandated that states establish presumptively correct guidelines, the states were left to develop formulas that would result in numerical figures and to identify factors that would justify deviation. According to the Chairman of the Advisory Panel on Child Support Guidelines, the goals of the Act were

> (1) to enhance the adequacy of orders . . . by making them more consistent with economic evidence on the costs of child rearing; (2) to improve the equity of orders by ensuring more comparable treatment for cases with similar circumstances; and (3) to improve the efficiency of adjudicating child support orders by encouraging voluntary settlements and reducing the hearing time. . . .[22]

The task of designing guidelines is daunting: Drafters must balance the competing demands and needs of children, the custodial parent, and the noncustodial parent with resources that simply will not stretch to replicate the pre-divorce standard of living.[23] To assist the states in balancing these demands, the Advisory Panel on Child Support Guidelines provided a set of recommended principles, including: (1) parents should share financial responsibility for children based upon their income; (2) parents should not be deprived of subsistence level resources; (3) children should share in the above-subsistence-level standard of living of higher income parents; (4) guidelines should apply equally to children born out of wedlock; (5) guidelines should not create disencentives to marriage or work; (6) guidelines should consider financial support provided in shared custody or extended visitation arrangements.[24]

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[22] MORGAN, *supra* note 5, § 1.02[e], at 1-10 n.30 (including comments of Dr. Robert Williams, Chairman of the Advisory Panel on Child Support Guidelines).

[23] The same income that supported one household, post-dissolution, must support duplicate expenditures for two households. Bureau of Labor Standards scales estimate that a two parent, one child household will need 117% of predivorce income to maintain its standard of living in two households. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REVISED EQUIVALENCE SCALE FOR ESTIMATING EQUIVALENT INCOMES OR BUDGET COSTS BY FAMILY TYPE 14 (1968).

2. *State Models: The Common Theme*

Three models grew out of the states' efforts to comply with the federal directives. Variations exist within the three models; however, all attempt to accommodate the principles set out above through an approach called income sharing. The idea underlying each is that children of divorce should be supported by both parents with the same portion of family income used for their support before divorce.[25] For example, assume that economic data show that a two-parent home with three children spends thirty percent of net income on the children. If the couple divorces, according to the income sharing approach, each parent should spend thirty percent of his or her net income on the children's support. The noncustodial parent should pay thirty percent of net income as child support, while the custodial parent should spend thirty percent of net income directly on expenditures in the home.[26] States have expressed this common theme, however, in three different formulations: the percentage of income method, the income shares method, and the Delaware-Melson formula. Within each state, the selected formula is applied to produce the presumptively correct amount of basic child support.[27] For a court to deviate from the presumptively correct amount, it must make written findings justifying the deviation.

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[24] *See* MORGAN, *supra* note 5, § 1.02[d], at 1-9 to 1-10. The statements of principles and goals underlying the guidelines provide a useful reference point to assess whether the guidelines should be followed in a particular case. *See id.* § 1.02[c][3], at 1-9.

[25] Another proposed model is the Equal Living Standards model, or income equalization, which is based upon the notion that the child should share the non-custodial parent's living standard; thus, the non-custodial parent's child support payment should be sufficient to equalize income between the two households. While the model implements the principle that the child should share in a higher-income parent's wealth, it is criticized as counter to the principle that guidelines should not discourage the custodial parent from entering the workforce. The model is the focus of discussion but is not currently used by any state. *See* IRA MARK ELLMAN, FAMILY LAW: CASES, TEXT, PROBLEMS 525 (3d ed. 1998). Commentators note that this approach implicitly includes alimony for the custodial parent. *Id. See also* RUTKIN, *supra* note 7, § 33.04[2][b], at 33-28.

[26] ELLMAN, *supra* note 25, at 523. This approach, usually called the "Income Sharing" approach, has also been denominated the "Marginal Expenditure Model" of child support by some of the leading child support experts in the nation. Marginal Expenditure refers to the methodology by which the percentage attributed to each child is reached. To determine the amount per child this method uses the percentage of additional income per child a family must obtain to maintain its standard of living. Thus, the percentage is not actual family expenditure per child, but marginal, or minimal expenditure per child.

3. *The Flat Percentage of Income (POI) Method*

The flat percentage of income method is used by fourteen states, including Mississippi, and is the simplest to administer. Guidelines based on the flat percentage method provide that a noncustodial parent's basic support obligation is a certain percentage of income.[28] The percentages vary based upon the number of children for whom support is requested. In Mississippi the percentages vary from fourteen percent for one child to twenty-six percent for five or more children.[29] The percentages are applied to the non-custodial parent's income[30] without consideration of the custodial parent's income. If, for example, the non-custodial parent's adjusted income is $1600 a

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> Suppose, for example, that after the birth of the first child, a couple must spend $4,000 monthly to maintain the standard of living it could maintain as a childless couple with $3,000 of expenditure. In spending $4,000, the family is effectively devoting $1,000 to child expenditure, making the marginal cost of this only child 25% of total family expenditure ($1,000 divided by $4,000). If, after the birth of a second child, the family must spend $4,600 a month to enjoy the $3,000 standard of living maintained by the couple when childless, then marginal child expenditure for two children is $1,600, or 35% of total family expenditure ($1,600 divided by $4,600).

ELLMAN, *supra* note 25, at 513. Estimates of marginal expenditure per child vary. According to some commentators, states tend to choose estimates in the lower range. *Id.* at 527.

[27] Basic, or regular child support, refers to the amount due under the formula. *Id.* Additional amounts for unusual or high-ticket items such as medical care or child care may then be added to the basic child support. *Id.*

[28] *See, e.g.,* ALASKA CIV. R. 90.3 (1999); GA. CODE ANN. § 19-5-12 (1999); MISS. CODE ANN. § 43-19-101 (West Supp. 1999).

[29] MISS. CODE ANN. § 43-19-101(1).

[30] The definition of income, and the calculation of income, varies from state to state.

month, and the percentage applicable to two children is twenty percent, the noncustodial parent pays $320 a month. The custodial parent is presumed to use an equal percentage of income on direct expenditures. A few POI states have adopted a varying percentage model, in which the percentage of income decreases as the parent's income increases, under the assumption that higher income families spend a greater dollar amount, but a lower percentage of income, on children.[31]

4. *The Income Shares Method*

The income shares method looks to the income of both parents to calculate the support due.[32] In addition, percentages vary depending on combined parental income, based on the assumption that as total income increases, the percentage of expenditure decreases. Once the total amount of income of both parents is calculated and the appropriate percentage applied to both incomes to arrive at total child support, the non-custodial parent pays a prorated share. For example, assume that the custodial mother's income is $1200 a month, the non-custodial father's income is $2400 a month, and the applicable percentage for a total income of $3600 for two children is twenty percent. The total support obligation of both parents would be $720 a month. The noncustodial parent would be ordered to pay two-thirds of $720, or $480. The custodial parent would be expected to spend one-third of $720, or $240 directly on the children. By taking custodial parent income into account, the income shares method produces a different result where the custodial parent's income bumps total income into a higher bracket with a lower percentage. For example, if the custodial mother's income is $4800 a month, the non-custodial fathers income is $2400 a month, and the applicable percentage for a total income of $7200 is ten percent, the noncustodial parent would be ordered to pay one-third of $720, or $240 rather than the $480 that would result from consideration of his income alone.[33]

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[31] *See, e.g.*, N.D. ADMIN. CODE §§ 75-02-04.1 to .10 (1995); TEX. FAM. CODE ANN. §§ 154.061 to .062 (West 1996 & Supp. 1999).

[32] *See, e.g.*, ALA. R. JUD. ADMIN. 32 (1998); IOWA C.S.G. (1999); N.J. RULES OF COURT, Appendix IX (1999).

5. *The Delaware-Melson Formula*

The Melson formula used in Delaware, the most complicated of the three formulas, begins by identifying a safety net for each parent to provide for the parent's minimal needs. Any additional income available to the parents over the safety net is used to provide the child's base support obligation. Once the base support for the child is met any additional parental income is subject to a standard of living allowance or percentage for the child, which allows the child to share in the parent's additional income.[34]

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[33] *See* MORGAN, *supra* note 5, § 103[b], at 1-17 to 1-19; RUTKIN, *supra* note 7, § 33.06[2], at 33-60 to 33-61; ELLMAN, *supra* note 25, at 532.

[34] *See* MORGAN, *supra* note 5, § 1.03(d), at 1-24. (setting out example):

> Using the Delaware Child Support Guidelines, the calculation of child support would be as follows:
>
> 1. Subtract federal and state taxes, and subtract a self-support reserve of $550 for each parent to yield a "net" income of $950 for the noncustodial parent, and $230 for the custodial parent.
> 2. Add the two net incomes of the parents to reach a combined net available income of $1,180. Thus, the custodial parent's proportional obligation is 80%, or $950 [divided by] $1180.
> 3. The basic support obligation is determined. Using the chart provided, it is $220 for one child.
> 4. Added to the $220 are child care expenses of $50 per month, to yield a primary support obligation of $270.
> 5. Determine the amount of SOLA available. The SOLA amount is the amount determined in (2), $ 1,180, minus the amount determined in (4), $270. The available SOLA is $910. The SOLA percentage, as determined from the chart provided, is 18%; thus, the SOLA is $163.80.
> 6. Add together the primary support obligation, $270, plus the SOLA obligation, $163.80. The total support obligation is thus $433.80.
> 7. Multiply the total support obligation by the appropriate noncustodial parent percentage to yield the noncustodial parent's obligation. In this case, it is $347.04.

Id. § 1.03[d], at 1-24 to 1-25. *See also* RUTKIN, *supra* note 7, § 33.06[3], at 33-62; ELLMAN, *supra* note 25, at 533-34.

6. *Comparison of the Three Models*

The percentage of income method, recommended by its simplicity, is sometimes perceived as less fair than the income shares method because it does not explicitly consider the custodial parent's income and generally allows less flexibility to accommodate unusual arrangements or expenses. The income shares method is perceived as more fair and more flexible, but it is criticized for its reduction in percentages in higher income brackets.[35] The Melson formula, appreciated for its attempt to accommodate conflicting goals, is often perceived as unduly complicated.[36] Commentators note that in the middle income ranges, all three formulas tend to produce similar results, particularly when there is not a wide disparity between the parents' incomes. At lower income levels, the income shares formula tends to yield the highest awards, while at higher income levels, the percentage of income formula tends to yield the highest awards.[37] While the debate continues regarding the best formula for determining support awards, there is general agreement that the enactment of rebuttable guidelines has increased consistency in awards,[38] encouraged settlements,[39] and generally increased the amount of awards.[40]

The three methods of calculation provide mathematical formulae for determining the basic child support award. However, a number of other considerations affect the support award. Threshold issues arise concerning the definition of income to which the percentages should be applied and the appropriate deductions from income prior to application of the percentages. After basic support is determined, the ultimate support figure may be altered by the inclusion of add-ons for expenses such as child care, insurance, medical costs, or education. The court may also deviate from the percentage of income formula based upon criteria such as shared parenting arrangements or unusual needs of the child. In addition, many statutes treat low and high income parents outside the presumptive guidelines. Section II analyzes application of the Mississippi guidelines, including the determination of gross income, adjustment of income, application of the percentages, addition of costs over basic support, and deviation from the guidelines.

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[35] Detractors argue that in intact families, the children benefit not only from a share of consumer consumption, or direct spending, but from savings and investment as well. MORGAN, *supra* note 5, § 1.03[b][2], at 1-19.

[36] *Id.* § 1.03[d][2], at 1-25.

[37] *Id.* § 1.03[e], at 1-27.

[38] *See* Thoennes, *supra* note 3, at 345; Robert G. Williams, *Guidelines for Settling Levels of Child Support Orders*, 21 FAM. L.Q. 281, 286 (1987) (noting that awards will likely fall "within a predictable range").

[39] *See* Thoennes, *supra* note 3, at 341; Williams, *supra* note 38, at 286.

[40] Irwin Garfinkel et al., *Child Support Guidelines: Will They Make a Difference?*, 12 J. FAM. ISSUES 404, 405 (1991).

II. THE MISSISSIPPI GUIDELINES

Until just over ten years ago, child support awards in Mississippi were within the sound discretion of the chancellor hearing the case based upon criteria established by the Mississippi Supreme Court in *Brabham v. Brabham.*[41] Chancellors were to consider the health, income, and earning capacity of both parents; the reasonable needs of the child and custodial parent; the necessary living expenses of the non-custodial parent; tax consequences to both parties; whether the custodial parent had the free use of home, furnishings, or automobile; and other such relevant facts and circumstances.[42] Trial of a child support case under the common-law method required proof of the income and monthly expenses of the mother and father and of child-related expenses. The judge then awarded as support an amount sufficient to support the child and within the means of the noncustodial parent. Awards were overturned only upon a showing that the judge had abused his discretion in making the award.

The indeterminate standards of need and ability were replaced in 1989 when Mississippi adopted statutory child support guidelines pursuant to the federal mandate. The state adopted the flat percentage method of calculating support, specifying that the guidelines constitute a rebuttable presumption in both awards and modifications of child support.[43] The statute was amended the following year to establish lower percentages which remain in effect today: fourteen percent for one child, twenty percent for two; twenty-two percent for three; twenty-four percent for four; and twenty-six percent for five or more.[44] The percentages are applied to the noncustodial parent's adjusted gross income without consideration of the custodial parent's income. Adjusted gross income is defined as gross income[45] less deductions for federal, state, and local taxes,[46] social security contributions,[47] mandatory retirement and disability contributions,[48] and existing child support orders.[49] The court also has discretion to deduct an "appropriate" amount for the payor's children living in the home with him or her.[50]

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[41] 84 So. 2d 147 (Miss. 1955).

[42] *Brabham,* 84 So. 2d at 153.

The presumption that the percentages are appropriate applies only to noncustodial parents whose adjusted gross income falls between $5000 and $50,000.[51] For persons whose income falls outside that range, the court must make a specific, written finding in the record regarding the appropriateness of the guidelines.[52] For persons whose income falls within the range, the court may deviate from the guidelines only upon a written finding that application of the guidelines would be inappropriate based upon criteria set out in section 43-19-103.[53] The deviation criteria include extraordinary medical, psychological, dental, or educational expenses, or special needs of the child, shared parental arrangements, age of the child, independent income of the child, spousal support to the custodial parent, total available assets of the parents, seasonal variations in income or expenses of one or both spouses, and any other adjustment needed to achieve an equitable result.[54]

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[43] MISS. CODE ANN. § 43-19-101 (Lexis Supp. 1999). *See also* MISS. CODE ANN. § 43-19-103 (1972) (rebuttable presumption). *See supra* notes 23-27 and accompanying text.

[44] MISS. CODE ANN. § 43-19-101 (1).

[45] MISS. CODE ANN. § 43-19-107(3)(a). Gross income includes income from all potential sources, including, but not limited to:

> wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse.

Id.

[46] § 43-19-101(3)(b)(i). This does not include any tax withholding or payment over actual tax liability for the year. *Id.*

[47] § 43-19-101(3)(b)(ii).

[48] § 43-19-101(3)(b)(iii).

[49] § 43-19-101(3)(b) & (c) (Lexis Supp. 1999).

[50] § 43-19-101(3)(d).

Application of the Mississippi guidelines is a five-step process. First, the court must determine gross income from all includable sources. Second, various deductions are then used to arrive at adjusted gross income. Third, the appropriate percentage is applied to adjusted gross income to arrive at basic child support. Fourth, additional sums may be added to the basic child support for expenses not covered in the basic support. Finally, the court may deviate from the presumptively correct basic support award upon consideration of deviation factors. The following sections discuss issues that arise at each stage of the process.

A. Computing Gross Income

The Mississippi guidelines, in compliance with federal requirements, provide that income includes all income and earnings of the noncustodial parent.[55] The statute specifically provides that income includes:

> wages and salary income; income from self employment; in-

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[51] § 43-19-101(4).

[52] § 43-19-101(4).

[53] § 43-19-101(2).

[54] § 43-19-103.

[55] § 43-19-101; *see also* 45 C.F.R. § 302.56(c)(1).

> come from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; and any other earned income.[56]

1. *Wages, Overtime, and Second Jobs*

In most states, income from overtime and second jobs is included in gross income if the work is consistent and predicable.[57] If the overtime is unpredictable, courts are more likely to exclude the income.[58] Similarly, income from regular second jobs is usually included while income from work that is short term and not expected to continue is generally excluded.[59] A few states exclude income from work over forty hours a week.[60]

The Mississippi statute does not mention overtime or second jobs, but does clearly reflect an intention to include all earned income. The Mississippi Supreme Court has held, similar to the majority of states, that a regular second job is includable income,[61] while a one-time teaching job should not be included in gross income.[62]

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[56] MISS. CODE ANN. § 43-19-101(3)(a) (Lexis Supp. 1999).

[57] *See, e.g.,* WASH. REV. CODE ANN. § 26.19.071(1)(e).

[58] *See* OHIO REV. CODE ANN. § 3113.215 (West 1999) (including income and based on three-year average); WASH. REV. CODE ANN. § 26.19.075(1)(b) (West Supp. 2000) (excluding nonrecurring income); State *ex rel.* Smith v. Smith, 631 So. 2d 252, 255 (Ala. Civ. App. 1993); Skipper v. Skipper, 654 So. 2d 1181, 1183 (Fla. Dist. Ct. App. 1995); Price v. Dawkins, 247 S.E.2d 844, 845 (Ga. 1978); Timmons v. Timmons, 605 So. 2d 1162, 1166 (La. Ct. App. 1992); Polen v. Polen, 886 S.W.2d 701, 705 (Mo. Ct. App. 1994) (including sporadic overtime).

[59] *See* Erler v. Erler, 390 N.W.2d 316, 319-20 (Minn. App. 1986) (including father's income from two regular part-time jobs).

[60] MINN. STAT. ANN. § 518.551 (West Supp. 2000) (not including income for work over 40 hours per week if work began after divorce action was filed, is an increase in work, and is not required by employer); N.H. REV. STAT. ANN. § 458-C:2(IV) (stating income earned for hours over 40 hours not considered).

[61] *See* Carter v. Carter, 735 So. 2d 1109, 1115-16 (Miss. 1999) (stating that

2. *Payments from Federal, State, and Local Governments*

In most states, gross income includes any benefits or payments under federal, state, or local programs with the exception of means-tested programs for low-income persons. Income includes social security payments,[63] disability payments,[64] veterans' benefits,[65] and national guard income,[66] as well as any other benefit intended to replace wages or income, such as workmen's compensation,[67] unemployment,[68] and other disability benefits.[69] The Mississippi statute specifically includes retirement and disability benefits, workmen's compensation, and unemployment benefits in gross income, and provides a catch-all provision for any other payments by federal, state, or local government.[70]

Social security benefits payable to the child or the custodial parent on the noncustodial parent's account may affect the support calculation. If a child receives benefits due to the noncustodial parent's retirement or disability, a majority of states reduce the child support award by the amount of the social security benefit received by the child.[71] Mississippi, in keeping

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20% of adjusted gross income includes income from a paper route, in addition to regular employment).

[62] In *Johnston v. Johnston*, 722 So.2d 453 (Miss. 1998), the court held that the chancellor erred in including income from a one-semester, one-time teaching job in the husband's income.

[63] *In re* Marriage of Lee, 486 N.W.2d 302, 304-05 (Iowa 1991); *In re* Marriage of Benson, 495 N.W.2d 777, 781 (Iowa Ct. App. 1992); *In re* Marriage of Callaghan, 869 P.2d 240, 241 (Kan. App. 1994); *In re* Marriage of Durbin, 823 P.2d 243, 246 (Mont. 1991).

[64] *In re* Marriage of Briscoe, 949 P.2d 1388, 1390-91 (Wash. 1998).

[65] Rose v. Rose, 481 U.S. 619, 630-31 (1987) (holding that veteran's benefits are income despite federal law that veterans' benefits are not subject to attachment).

[66] *In re* Marriage of McPheter, 803 P.2d 207 (Kan. App. 1990).

[67] *In re* Marriage of Sullivan, 258 Mont. 531, 853 P.2d 1194 (Mont. 1993); Gonsalves v. Roberts, 905 S.W.2d 931 (Tenn. 1995).

[68] *In re* Marriage of Robbins, 510 N.W.2d 844, 846 (Iowa 1994).

[69] *In re* Marriage of Franz, 831 P.2d 917, 919 (Colo. Ct. App. 1992); Maroney v. Maroney, 644 A.2d 827, 827 (R.I. 1994).

[70] MISS. CODE ANN. § 43-19-101(3)(a) (Lexis Supp. 1999).

[71] Cash v. Cash, 353 S.W.2d 348 (Ark. 1962); Perteet v. Sumner, 269 S.E.2d

with the majority, permits a dollar-for-dollar offset against child support.[72] In addition, the court has held that if a child is eligible for benefits based on the noncustodial parent's retirement and does not request them, child support should be reduced by the amount the child would have received.[73] On the other hand, the court held in *Hammett v. Woods* that SSI benefits received by a disabled minor child on his own account should not alter the father's obligation to pay child support.[74] In income shares states, payments to the custodial parent as a benefit from the noncustodial parent's social security are considered income to the custodial parent.[75]

Means-tested government payments such as Technical Assistance to Needy Families (TANF), Supplemental Security Income (SSI), or Food Stamps are generally not included in gross income, since such payments are designed to provide a minimum level of support for the recipient household.[76] The Mississippi statute does not specifically list such benefits as includable income; however, it does state that income includes "any other payments made by any person, private entity, federal or state government or any unit of local government."[77]

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453 (Ga. 1980); Andler v. Andler, 538 P.2d 649 (Kan. 1975).

[72] Hammet v. Woods, 602 So. 2d 825 (Miss. 1992); Mooneyham v. Mooneyham, 420 So. 2d 1072, 1073 (Miss. 1982).

[73] Bradley v. Holmes, 561 So. 2d 1034, 1035-36 (Miss. 1990) (holding that mother did not request benefits based on father's retirement because child could receive higher payments by requesting benefits based on stepfather's retirement).

[74] 602 So. 2d 825, 830 (Miss. 1992).

[75] Williams v. Williams, 789 S.W.2d 781, 782 (Ky. 1990).

[76] *See In re* Marriage of Benson, 495 N.W.2d 777, 782 (Iowa Ct. App. 1992) (stating SSI and AFDC are not income); Youngblood v. James, 883 S.W.2d 512, 513 (Ky. Ct. App. 1994) (stating SSI is not income). This is the position recommended by the Advisory Panel on Child Support Guidelines. *See* R. WILLIAMS, DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL'S RECOMMENDATIONS AND FINAL REPORT, at II-44 (U.S, Dep't of Health and Human Services, Office of Child Support Enforcement, 1987).

[77] MISS. CODE ANN. § 43-19-101(3)(a) (Lexis Supp. 1999).

3. Alimony and Child Support

In most states, alimony is included in gross income for purposes of child support, while child support payments for other children are not included. This is consistent with the notion that alimony payments are for the support of the adult recipient and taxed as income, while child support payments are for the support of the minor children and not income to the recipient.[78] Interestingly, many states distinguish between alimony paid by a former spouse, which is income for child support purposes, and alimony payable from the other parent in the case, which is not deemed income.[79] The Mississippi guidelines provide, without distinguishing the source, that alimony payments are includable in child support income.[80] The Mississippi statute does not list child support payments as income. Arguably, the provision that income includes "any other payments made by any person" could require the inclusion of child support payments for other children living with the noncustodial parent.[81] On the other hand, Mississippi law makes clear that child support payments are held in trust by the recipient for the child. In holding that parents may not compromise their children's right to support, the court stated, "Child support is awarded to the custodial parent for the benefit and protection of the child. Child support benefits belong to the child, and not the parent who, having custody, receives such benefits under a fiduciary duty to hold and use them for the benefit of the child."[82]

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[78] *See* MORGAN, *supra* note 5, § 2.01[f].

[79] *See* CAL. FAM. CODE § 4058 (West 1994) (stating alimony received from a prior spouse is income); LA. REV. STAT. ANN. § 9:315 (West Supp. 2000); ME. REV. STAT. ANN. tit. 19-A, § 101 (West 1997); OHIO REV. CODE ANN. § 3113.215 (Anderson 1998); *see also* Pelton v. Pelton, 617 So. 2d 714 (Fla. Dist. Ct. App. 1992); Runyon v. Runyon, 907 S.W.2d 267 (Mo. Ct. App. 1995).

[80] MISS. CODE ANN. § 43-19-101.

[81] § 43-19-101(1).

[82] Lawrence v. Lawrence, 574 So. 2d 1376, 1380 (Miss. 1991) (quoting Cumberland v. Cumberland, 564 So. 2d 839, 847 (Miss. 1990)).

4. *Income from Self-Employment*

Determining adjusted gross income is fairly simple when the payor is salaried. Setting a figure for a self-employed payor is significantly more complicated. The usual test is gross income[83] less ordinary and reasonable expenses incurred in producing the income. Most of the questions that have arisen center around what constitutes an ordinary and necessary expense. For example, courts have struggled with whether depreciation is an allowable expense. Some states disallow depreciation,[84] some disallow accelerated depreciation,[85] and some leave the question to the discretion of the court.[86] As to other business expenses, courts allow expenses that are deemed necessary to the production of income but tend to disallow those that are viewed as personal expenses such as clothing, entertainment and car, non-business travel, or other leisure activities.[87] Another area of dispute involves the treatment of business loans with some courts treating repayment as a deductible business expense,[88] some treating it as a nondeductible personal expense,[89] and one state distinguishing between a business loan to maintain the business, which is deductible, and a loan to expand the business, which is not.[90] Courts have similarly disagreed regarding the deductibility of student loans as a business expense.[91]

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[83] "Gross income" generally includes income retained in a close corporation or partnership. Anderson v. Anderson, 963 S.W.2d 604 (Ark. Ct. App. 1998); Roth v. Roth, 406 N.W.2d 77 (Minn. Ct. App. 1987).

[84] D.C. CODE ANN. § 16-916.1 (1997); N.D. ADMIN. CODE § 75-02-04.1. *See* Stewart v. Stewart, 793 P.2d 813 (Mont. 1990).

[85] Freking v. Freking, 479 N.W.2d 736 (Minn. Ct. App. 1992) (stating that accelerated depreciation permitted by tax code is not ordinary and necessary expense for purposes of child support and allowing straight line depreciation only).

[86] TEX. FAM. CODE ANN. § 154.005[b] (West Supp. 1999).

[87] Coghill v. Coghill, 836 P.2d 921, 927 (Alaska 1992) (holding that party could not deduct clothing as purported business expenses); Cahoy v. Darsaklis, 584 N.W.2d 36, 41-42 (Neb. Ct. App. 1998) (stating that cost of farming cannot be deducted as farming expense).

[88] Cox v. Cox, 580 N.E.2d 344, 351 (Ind. Ct. App. 1991); Luker v. Luker, 861 S.W.2d 195, 199 (Mo. Ct. App. 1993)

[89] Zabrowski v. Zabrowski, 594 N.E.2d 821, 824 (Ind. Ct. App. 1992); Merrill v. Merrill, 587 N.E.2d 188, 189 (Ind. Ct. App. 1992).

[90] Jurado v. Jurado, 892 P.2d 969, 977 (N.M. 1995).

There is relatively little guidance in Mississippi for determining self-employment income. The statute simply states that income from self-employment is includable income.[92] In *Burnham-Steptoe v. Steptoe*, the court recently approved a chancellor's method of arriving at adjusted income of a self-employed payor.[93] First, the court reviewed the father's earnings over the only available nine months, reducing the actual draw by $12,000 to reflect a one-time draw used for business purposes.[94] The court translated the resulting figure into a yearly amount and then reduced that amount by thirty percent to reflect standard figures for taxes and social security.[95] Although there is only limited discussion of the deduction, the court's approval of the reduction for business purposes suggests that self-employment income includes gross income less ordinary mandatory deductions and business-related expenses.

5. *Current Spouse's Income*

Some states flatly prohibit consideration of a new spouse's income in determining the income base for child support,[96] while a few permit consideration under limited circumstances.[97] Without statutory guidance courts have tended to disregard spousal income unless it is used directly to reduce the payor's expenses.[98] The Mississippi statutory guidelines are in line with the majority, providing that "gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse."[99]

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[91] *In re* Davis, 679 N.E.2d 110, 116 (Ill. App. Ct. 1997) (stating that student loan was reasonable and necessary for production of income); Jensen v. Bowcut, 892 P.2d 1053, 1057 (Utah Ct. App. 1995) (allowing no deduction for student loans).

[92] MISS. CODE ANN. § 43-19-101 (Lexis Supp. 1999).

[93] No. 97-CA-00428-COA, 1999 WL 711373 (Miss. Ct. App. Sept. 14, 1999).

[94] *Steptoe*, 1999 WL 177373, at *6.

[95] *Id.*

[96] *See, e.g.,* IDAHO R. CIV. PRO. 6(c)(6); MINN STAT. ANN. § 518.551 (West Supp. 2000); MISS. CODE ANN. § 43-19-101; UTAH CODE ANN. § 78-45-7.4 (1996); WASH. REV. CODE ANN. § 26.19.071(4) (West Supp. 2000).

[97] FLA. STAT. ANN. § 61.30 (West 1997) (stating that new spouse's income may be considered in action to modify support for subsequent children); N.H. REV. STAT. ANN. § 458-C:2(IV)(b) (1992) (holding that new spouse's income considered where payor forgoes employment due to income).

[98] MORGAN, *supra* note 5, § 2.03[e]. Morgan finds this approach the most

B. Imputing Income

Rather than using a payor's actual income courts may impute income to be used as the basis for child support when a parent is employed below earning capacity. Most state statutes specifically authorize courts to look to earning capacity in such cases.[100] The test for imputation is usually whether the parent's failure to work at earning capacity is voluntary.[101] However, some states require, in addition, that the income reduction be in bad faith, that is, for the purpose of evading child support obligations.[102] In imputing income, the court should determine earning capacity and reduce the amount to adjusted gross income. The Mississippi Court of Appeals reversed a chancellor's award of child support based upon an unemployed father's earning potential, where the award was calculated based upon prior gross earnings rather than prior adjusted gross income.[103]

1. Test for Imputing Income[104]

Although Mississippi child support guidelines do not expressly authorize courts to consider imputed income, the Mississippi Supreme Court has imputed income in a number of

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consistent with the federal guidelines since a payor's income is of greater value if expenses are reduced. *Id.* at 2-39.

[99] MISS. CODE ANN. § 43-19-101.

[100] MORGAN, *supra* note 5, § 2-57.

[101] Pellerin v. Pellerin, 715 So. 2d 617, 621 (La. Ct. App. 1998); Wright v. Wright, 975 S.W.2d 212, 214 (Mo. Ct. App. 1993); *In re* Marriage of Bertram, 981 S.W.2d 820, 829 (Tex. Ct. App. 1998).

[102] Michigan Child Support Guidelines Manual 7, promulgated by the State Court Administrative Office, MICH. STAT. ANN. *cited in* RUTKIN, *supra* note 7, § 33.05[2], at 33-42 n.13.

[103] Osborn v. Osborn, 724 So. 2d 1121, 1125 (Miss. App. 1998).

[104] The test for imputing income is the same in initial award actions and modification actions. Because the issue tends to arise more often in reported modification cases these cases are used here as illustrative.

cases. Early cases imputing income included both the voluntariness and bad faith tests. In *Parker v. Parker*, the court stated,

> The law is well-settled that, if an obligor, acting in bad faith, voluntarily worsens his financial position so that he cannot meet his obligations, he cannot obtain a modification of support. . . . "Bad faith" has generally been defined as an obligor's action to reduce income or assets for the purpose of "jeopardizing the interests of his children."[105]

The court clarified the test for imputation in two recent cases, expanding the definition of bad faith beyond intentional avoidance of child support. In *Bailey v. Bailey*, the court acknowledged the bad faith component of the *Parker* test, but looked to the Black's Law Dictionary definition of bad faith as "[t]he opposite of 'good faith,' . . . a neglect or refusal to fulfill some duty or some contractual obligation."[106] In *Bailey*, a noncustodial mother sought a reduction in child support when she quit her job to stay home with a new baby. The court agreed that the mother may not have intended to jeopardize the interests of her older children, but that she nonetheless "compromised their interests in favor of her new baby. . . . Her conduct amounts to 'a neglect or refusal to fulfill some duty' and therefore constituted bad faith."[107] In *Pullis v. Linzey*, the court stated that the true issue was voluntariness, not whether the action was taken for the purpose of avoiding child support responsibilities. The court did not completely abandon the bad faith test, but reiterated the *Bailey* definition of bad faith as "neglect to fulfill a duty by some interested motive."[108]

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[105] 645 So. 2d 1327, 1331 (Miss. 1994). *See also* Lahmann v. Hallmon, 722 So. 2d 614, 622 (Miss. 1998) (stating that lifestyle was deliberate and voluntary action to reduce child support).

[106] 724 So. 2d 335 (Miss. 1999).

[107] *Bailey*, 724 So. 2d at 338.

[108] No. 1998-CA-01638-COA, 1999 WL 1034832, at *4 (Miss. App. 1999).

2. *Voluntary Reduction in Income*

The court consistently imputes income where the payor leaves a job voluntarily and without health related reasons. In *Selman v. Selman*, the court instructed the chancellor to consider the father's earning capacity, rather than his actual earnings, in setting child support.[109] The father, a former restaurant manager earning $26,000 a year, had quit his job to preach at a monthly salary of $700.[110] Similarly, in *Lahmann v. Hollmon*, the court rejected a non-custodial father's request for modification of child support based upon his voluntary reduction in income from a construction job to singing two nights a week in a club.[111] The court also imputes income where the noncustodial parent is unemployed but able. In *White v. White*, the court upheld a support order based upon the chancellor's assessment of an unemployed but able father's ability to earn rather than on fourteen percent of his unemployment income.[112] The chancellor considered Mr. White's educational level, past earning record, and employability and determined that he should be able to earn sufficient income to justify a child support award of $178.50 per month.[113] The court has also upheld a combined award of child support and alimony constituting eighty-nine percent of a payor's unemployment income, where it appeared likely that he would resume work soon.[114]

The difficult imputed income cases generally center around the question of voluntariness. Recurring fact patterns that raise issues of voluntariness include firings, imprisonment, illness, early retirement, or a payor's decision to return to school or stay at home with children.

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[109] 722 So. 2d 547, 554 (Miss. 1998).

[110] *Selman*, 722 So. 2d at 550.

[111] *Lehmann*, 722 So. 2d at 622 (concluding that father's lifestyle change was deliberate and voluntary action in order to reduce income and thereby reduce his child support).

[112] 722 So. 2d 731, 734 (Miss. App. 1999).

[113] *White*, 722 So. 2d at 733.

[114] Osborn v. Osborn, 724 So. 2d 1121, 1126 (Miss. App. 1998).

a. Discharge from Employment

Courts generally hold that a payor who is fired from a job without fault has suffered an involuntary decrease in income.[115] However, if a payor is fired for wrongdoing, some courts will not relieve support obligations, reasoning that the loss of income was based on a voluntary, wrongful act.[116] Others refuse to impute income under these circumstances.[117] The Mississippi court considered the impact of firing for misconduct in *Parker v. Parker*, a case in which a payor was terminated from employment for alleged sexual misconduct.[118] The court rejected his ex-wife's argument that the firing was voluntary because it was based on voluntary wrongdoing and held that he was entitled to a reduction in child support based upon a material change in circumstances.[119] However, it can be argued that *Parker* is not binding in future discharge cases. The court held that there was no evidence that Parker engaged in conduct in bad faith for the purpose of avoiding child support.[120] The court's redefinition of bad faith in *Bailey* could affect the court's view of wrongful conduct leading to firing.

b. Imprisonment

Imprisonment raises issues similar to firing for cause, involving an arguably involuntary loss of income occasioned by the payor's voluntary wrongful actions. While most courts have found imprisonment to be an involuntary act supporting a modification in child support,[121] some have refused to reduce support[122] particularly if the payor has sufficient assets from which support could be provided.[123]

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[115] *See, e.g.,* Grable v. Grable, 821 S.W.2d 16, 19 (Ark. 1991); Grady v. Grady, 640 So. 2d 157, 157 (Fla. Dist. Ct. App. 1994); Duncan v. Duncan, 426 S.E.2d 857, 860 (Ga. 1993).

[116] Cunningham v. Cunningham, 641 So. 2d 807, 809 (Ala. Civ. App. 1994); Pope v. Pope, 559 N.W.2d 192, 196 (Neb. 1997).

[117] *In re* Johnson, 950 P.2d 267, 270 (Kan. Ct. App. 1997); Klahold v. Kroh, 649 A.2d 701, 704 (Pa. Super. Ct. 1994).

[118] 645 So. 2d 1327, 1328-31 (Miss. 1994).

[119] *Parker*, 645 So. 2d at 1328-31. The facts also reflected that the payor was disputing the discharge and that he had continued to seek other employment pending the outcome of the appeal. *Id.* at 1331.

[120] *Id.*

[121] *See* Pickett v. Pickett, 709 So. 2d 182, 183 (Fla. App. 1998); Jones v. Reed,

c. Illness

Quitting a job or retiring early because of poor health is frequently the basis for a payor's request for downward modification of child support. Resolution tends to be on a case-by-case basis, generally depending on the payor's presentation of independent evidence of the job's detrimental impact on his physical or mental health. The Mississippi Supreme Court has addressed health related modification in a number of cases. In *Kennedy v. Kennedy*, for example, the court permitted modification where the payor took early retirement after his job was altered to require heavy physical labor that he was unable to perform because of knee problems.[124] In contrast, in *Poole v. Poole* the court upheld a chancellor's refusal to modify child support based upon a physician's alleged decrease in income from $300,000 a year to $93,000 a year.[125] Dr. Poole testified that he was unable to pursue his specialty because of depression and alcohol problems.[126] The chancellor was influenced by the fact that, although Dr. Poole stated that he acted on the advice of his psychiatrist in leaving his specialty, he offered no proof but his own testimony.[127] Similarly, in *Pullis v. Linzey*,

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705 A.2d 158, 161 (Md. 1998); Wood v. Wood, 964 P.2d 1259, 1266-67 (Wyo. 1998).

[122] *See* Davis v. Vance, 574 N.E.2d 330 (Ind. Ct. App. 1991); *In re* Marriage of Kern, 408 N.W.2d 387, 389-90 (Iowa Ct. App. 1987); Toups v. Toups, 708 So. 2d 849, 850 (La. Ct. App. 1998).

[123] Alred v. Alred, 678 So. 2d 1144, 1146 (Ala. Civ. App. 1996).

[124] 650 So. 2d 1362, 1369-72 (Miss. 1995). This was a separate maintenance, rather than child support; however, the issue was the same: whether the payor had voluntarily reduced his income. *Kennedy*, 650 So. 2d at 1369-72.

[125] 701 So. 2d 813, 819 (Miss. 1997).

[126] *Poole*, 701 So. 2d at 815.

[127] *Id.* at 815-16. The chancellor found that these problems were evident at the time the divorce agreement was signed; thus, the changes did not result from circumstances not reasonably anticipated at the time of the agreement. *Id.* In addition, the chancellor relied on statements by Dr. Poole in the divorce proceedings indicating that much of the $300,000 income was phantom income and that his actual adjusted monthly income was around $4700. *Id.* at 816-17.

the court held that a father's voluntary termination of employment as a tow boat captain for personal reasons was not grounds for modification of child support.[128] The father testified that he was on the boat 240 days a year, had no personal life, and suffered from work-related stress, which affected his health but offered no medical evidence of health related problems.[129]

d. Resignation to Pursue Schooling

Court responses are mixed to payor claims that support should be reduced for a voluntary return to school. A number of courts have refused to reduce support,[130] although some have reduced support upon a showing that the children will ultimately benefit from the payor's increased income as a result of the schooling.[131] The Mississippi Supreme Court has indicated in dicta that it would consider modification of a support decree based upon a good-faith reduction in income to further education.[132] In that case, however, the husband quit his job to return to college very shortly after the divorce, and the court held that the reduction was not a new circumstance because it was foreseeable at the time of the divorce.[133]

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[128] No. 1998-CA-01638-COA, 1999 WL 1034832, at *4 (Miss. App. Nov. 16, 1998).

[129] *Pullis*, 1999 WL 1034832, at *1.

[130] *See, e.g., In re* Marriage of McNeely, 815 P.2d 1125, 1129-30 (Kan. Ct. App. 1991) (refusing father's request to impute to him a smaller income based on his plans to enter law school); Sabatka v. Sabatka, 511 N.W.2d 107, 111 (Neb. 1994) (denying husband's request to reduce payments when he voluntarily enrolled in school); Schroeder v. Schroeder, 463 S.E.2d 790, 793 (N.C. Ct. App. 1995) (concluding that wife could not claim a change in circumstances because it was "a change that she brought about herself").

[131] *In re* Marriage of Ehlert, 868 P.2d 1168, 1169 (Colo. Ct. App. 1994); *In re* Marriage of Clyatt, 882 P.2d 503, 506 (Mont. 1994).

[132] Tingle v. Tingle, 573 So. 2d 1389, 1393 (Miss. 1990).

[133] *Tingle*, 573 So. 2d at 1392.

e. Staying Home To Care for Children

Parents who choose to stay home with children may face imputation of income in three different circumstances. Courts using income shares formulas must determine whether income should be imputed to a custodial parent who voluntarily chooses to stay at home.[134] In percentage of income states, noncustodial parents may seek to reduce existing support obligations to stay at home with later born children or may oppose a custodial parent's action to increase support based on the decision to stay at home. Some income shares states provide that income will not be imputed to a parent caring for a very young child of the payor.[135] Other states extend the same consideration to a parent who stays at home with children of the payor or children of a later marriage.[136] Courts considering the issue without statutory guidance are more likely to impute income to the custodial parent, particularly if the custodial parent is staying home with children of a later marriage.[137]

Imputation of income to the custodial parent is not an issue in Mississippi under the percentage of income formula for child support. However, a related issue arises when a noncustodial parent chooses to stay at home with later children. In *Bailey v. Bailey*, a non-custodial mother sought to reduce her child support after she voluntarily ended her employment to stay at home with her newborn child.[138] The court held that terminating employment to provide child care at home does not justify a modification in child support obligations to prior children.[139]

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[134] Imputing income to the custodial parent could reduce the applicable percentage applied to the noncustodial parent's income, thus reducing the actual child support payable to the custodial parent.

[135] *See* COLO. REV. STAT. ANN. § 14-14-102 (West 2000); KY. REV. STAT. ANN. §§ 403.211 (West 2000); LA. REV. STAT. ANN. § 9:315 (West 2000).

[136] *See* IDAHO R. CIV. PRO. 6(c)(6).

[137] *See* MORGAN, *supra* note 5, § 2.04[c][ix], at 2-79.

[138] 724 So. 2d 335, 336 (Miss. 1998).

[139] *Bailey*, 724 So. 2d at 338.

f. Hidden Income

Income may also be imputed to a payor if the court questions the accuracy of income figures provided by the payor. The Mississippi Supreme Court has indicated on a number of occasions that a chancellor may disregard the payor's statement of income. In *Grogan v. Grogan*, the chancellor ordered the husband to pay twenty-seven-and-a-half percent for two children, stating that there was considerable question about his actual earnings.[140] The supreme court upheld the deviation, noting that the court had reason to question the adjusted gross income amount.[141] Similarly, in *Dunn v. Dunn*, the court upheld a chancellor's refusal to reduce child support based upon his belief that the father had intentionally reduced income, falsified obligations, and was concealing current income.[142] In another case, the court held that a chancellor erred in disregarding a payor's paper route, which he claimed actually belonged to his mother.[143] The evidence showed that the route was in his name and he performed most of the work, while his mother received the income and made him a monthly "gift" of the proceeds.[144]

A recent case suggests that the court may require more specific findings tied to the child support statute in hidden income cases. In *Gray v. Gray*, the court noted that a chancellor was rightfully skeptical of a father's stated monthly income of $912, where the father managed twenty-eight apartment units rented at $350 monthly, bought a new truck, and paid his brother-in-law $32,000 during the proceedings.[145] However, the case was reversed because the chancellor failed to make any findings as to adjusted monthly income to support the award of $300 child support.[146] The court's opinion appears to require more specific findings than prior hidden income cases, stating that "[w]ithout having the benefit of the chancellor's findings of fact, it cannot be said that the guidelines were either followed or not followed."[147] Subsequently, however, in *Clark v. Clark*, the court affirmed a chancellor's award of $600 a month child support in excess of the guidelines, where the chancellor believed that the father was hiding income and assets without a specific finding as to actual income.[148] Justice McRae dissented, arguing that the chancellor should have been required to make specific findings regarding the allegedly hidden income.[149]

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[140] 641 So. 2d 734, 740-41 (Miss. 1994).

[141] *Grogan*, 641 So. 2d at 740.

[142] 695 So. 2d 1152, 1157 (Miss. 1997). The court found that the chancellor was justified in disregarding the father's statement of income based, in part, on his liquidation of his business without telling his ex-wife, who held a lien against the business; his various entertainment activities; and his inability to corroborate "loans" made to him. *Dunn*, 695 So. 2d at 1156.

[143] Carter v. Carter, 735 So. 2d 1109, 1115-16 (Miss. 1999).

[144] *Carter*, 735 So. 2d at 1115.

[145] 745 So. 2d 234, 237 (Miss. 1999).

C. *Adjustments to Gross Income*

The preceding section discusses issues that arise in calculating a noncustodial parent's gross income. Under most state child support guidelines, the statutory percentage is applied to net, or adjusted gross income, rather than to gross income.[150] The Mississippi guidelines provide that gross income is to be reduced by subtracting "legally mandated deductions" and existing child support orders and may be reduced by an appropriate amount for other children living with the payor.

1. *Mandatory Deductions*

Mandatory legal deductions under the Mississippi guidelines include federal, state, and local taxes, social security contributions, and mandatory retirement and disability.[151] The court held in *Lee v. Stewart* that deductions for 401K plans, medical insurance, and credit unions are not mandatory deductions under the statute.[152]

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[146] *Gray*, 745 So. 2d at 240.

[147] *Id.* at 237.

[148] No. 98-CA-00404-SCT, 1999 WL 1000707, at *10 (Miss. Nov. 4, 1999). The court did note, however, that the record supported the award and that the chancellor offered to re-evaluate the figures if the payor would submit more complete financial data. *Clark*, 1999 WL 1000707, at *9.

[149] *Id.* at *12 (McRae, J., dissenting).

[150] The court of appeals reversed an award of child support because the chancellor applied the percentages to gross income rather than adjusted gross income. Lee v. Stewart, 724 So. 2d 1093, 1097 (Miss. App. 1998).

2. *Earlier Born Children*

One frequently litigated issue in child support proceedings is the impact of the payor's obligation to other children. States have unanimously recognized that court-ordered support for prior children must be considered in setting child support. Most states deduct the existing support award from gross income to arrive at the adjusted income to which the percentage is applied.[153] Where prior children are living with the payor, or the payor is supporting them voluntarily in the absence of a court order, the results are less consistent across state lines. Most states allow the court discretion to consider voluntary support as a deduction or deviation.[154]

3. *Later Born Children*

Subsequent children raise the difficult question whether all children should be treated equally or whether a parent should be prevented from reducing his support for existing children by having additional children.[155] Some state statutes do not recognize or mention support obligations for later born children, while others provide that the court has discretion to deduct an appropriate amount from gross income or to consider the obligation in deviating from the guidelines.[156] Whether a deduction or deviation is allowed for subsequent children may depend on the procedural posture of the case. If the payor is in default on an existing support obligation and raises obligations to subsequent children as a defense, or tries to obtain a reduction in existing support, the court is unlikely to reduce the prior support obligations. However, if the payor raises the subsequent obligation as a defense to the payee's action to increase the prior award, the court is more likely to consider the obligation.[157]

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[151] MISS. CODE ANN. § 43-10-101(3)(b) (West 1999).

[152] *Lee*, 724 So. 2d at 1097.

[153] *See* RUTKIN, *supra* note 7, § 33.05[9], at 33-53.

[154] *See* Flanagan v. Flanagan, 673 So. 2d 894, 895-96 (Fla. Dist. Ct. App. 1996) (holding that it was error not to consider ex-wife's pre-existing support obligation); Division of Child Support Enforcement v. Estrada, 916 S.W.2d 443, 450-51 (Mo. Ct. App. 1996) (stating that support must be pursuant to court order); *In re* Marriage of Eilers, 526 N.W.2d 566, 569 (Iowa Ct. App. 1994) (same).

[155] *See generally* RUTKIN, *supra* note 7, § 33.05[9], at 33-54.

[156] *See* MORGAN, *supra* note 5, § 3.04[b], at 3-46 to 3-47, table 3-6.

4. *The Mississippi Approach*

The Mississippi child support guidelines, in keeping with the majority, provide that an existing court order is a "legally mandated deduction" from gross income.[158] The Mississippi guidelines provide that the chancellor has discretion to adjust income for prior children with no support order and subsequent children, if the children are living with the payor.[159] The provision applies only to the payor's children and not to the payor's stepchildren living in the home.[160] The Mississippi Supreme Court has struggled with application of this provision, illustrating the difficult policy choices inherent in multiple family support. In *Grace v. Department of Human Services*, Mr. Grace, a married man, was sued for support of an out-of-wedlock child.[161] At the time the suit was heard, Mr. Grace had two children of the marriage, one born prior to the out-of-wedlock child, and one born subsequently.[162] The chancellor allowed a deduction from gross income for the first child, but not for the second.[163] The Supreme Court reversed, holding that it was error not to allow a deduction for the second child.[164] It is unclear whether *Grace* meant that deductions for subsequent children must always be allowed, or whether it meant that if a deduction was allowed for one child in an intact household, it must be allowed for all. The following year, the court revisited the issue in a case presenting very different facts. In *Bailey v. Bailey*, a non-custodial mother attempted to use the provision offensively, arguing that her obligation to support a new child justified a downward modification of child support.[165] The court stated that the discretionary adjustment provision for children living in the home does not apply to allow a noncustodial parent to reduce an obligation to prior children.[166] Otherwise, a parent could "sire himself out of his child support obligation."[167] Because *Bailey* addressed only a parent's attempt to reduce prior obligations the birth of additional children may still provide a defense to a custodial parent's attempt to increase child support obligations.

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[157] RUTKIN, *supra* note 7, § 33.05[9], at 33-54.

[158] MISS. CODE ANN. § 43-19-101(3)(b).

[159] § 43-19-101(3)(d). Stating, "If the absent parent is also parent of another child or other children residing with him, then the court may subtract an amount that it deems appropriate to account for the needs of said child or children." *Id.*

[160] Kilgore v. Fuller, 741 So. 2d 351, 356-57 (Miss. App. 1999) (stating expense of stepson not allowed as deduction).

[161] 687 So. 2d 1232, 1233 (Miss. 1997).

[162] *Grace*, 687 So. 2d at 1233.

[163] *Id.* A reading of the case reveals that the chancellor permitted a deduction for the first child in the amount of 14% of gross income, the amount of support suggested by Mississippi child support guidelines. *Id.*

D. Applying the Percentage: Determining the "Number of Children"

The statutory guidelines provide that a percentage is applied to adjusted gross income to arrive at the base support figure. The percentages vary with the number of children, ranging from fourteen percent for one child to twenty-six percent for five or more children in Mississippi.[168] Without explicit statutory guidance the question arises whether "number of children" refers only to the children whose support is involved in a particular case, or whether it refers to all children of the payor. The difference in the resulting support order can be dramatic. In *Grace v. Department of Human Services*, Mr. Grace, the father of two children of his marriage, was sued for support of an out-of-wedlock child.[169] He argued that the proper amount of support was one-third of twenty-two percent, or $160.08 a month, rather than fourteen percent, or $305.75 per month.[170] The court focused on the language of the statute that specifically refers to percentages of adjusted gross income for the number of children "due support" and held that children living inside a parent's household are not "due" an award of child support.[171] Thus, the "number of children" means the number of children for whom an order of support is sought.

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[164] *Id.* at 1235.

[165] 724 So. 2d 335, 336 (Miss. 1998).

[166] *Bailey*, 724 So. 2d at 339.

[167] *Id.* Interestingly, the court remanded the case for a determination of whether there should be a temporary reduction in child support because of the birth of the new child. *Id.* at 339. In a subsequent case, the court affirmed that afterborn children do not warrant downward modification of prior child support decrees: "The addition to a noncustodial parent's family cannot be said to reasonably affect the ability of the parties to abide by the terms of the original divorce decree." Turner v. Turner, 744 So. 2d 332, 337 (Miss. 1999)

[168] MISS. CODE ANN. § 43-19-101(1) (Lexis Supp. 1999).

E. Add-ons To Base Support

Application of the statutory percentages to adjusted gross income produces the basic, or regular, child support award. The court may increase this figure to reflect additional amounts for expenses not covered by the basic award. The court in *Nichols v. Tedder* distinguished between "regular" or basic child support, which covers the child's basic living expenses such as food, clothing, and shelter, and "other sums" which a parent may be ordered to pay above regular child support, including medical insurance, health related expenses, life insurance, college education, and, in some cases, automobile or mortgage payments.[172] These items may be added to the basic child support award calculated under the guidelines.

1. Medical Insurance

Federal law mandates that state support guidelines specifically address provision for the child's medical needs.[173] Some state statutes address health insurance by having one parent pay the insurance and then deducting the cost of that insurance from gross income, thus reducing the child support award. Others simply add the cost to the basic support obligation. Others treat the cost as a deviation factor.[174] The cost may be borne by one parent, or the court may prorate the cost of health insurance between the parents. The Mississippi child support guidelines do not require that chancellors address a child's health needs,[175] although the divorce statutes provide that a chancellor may order a parent with group medical insurance to provide health insurance for the child.[176] Nor do the statutes explain how medical insurance relates to the child support award. Extraordinary medical expenses are listed as a factor constituting grounds for deviation from the presumptively correct figure, but medical insurance is not included as a deviation factor.[177]

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[169] *Grace*, 687 So. 2d at 1233.

[170] *Id.* at 1233.

[171] *Id.* at 1234.

[172] 547 So. 2d 766, 769 (Miss. 1989).

[173] 45 C.F.R. § 302.56(c)(3).

In practice, courts appear to calculate the basic support award and then add health insurance and sometimes all or one-half of out-of-pocket medical expenses to the basic award. Two recent Mississippi cases acknowledge real confusion about the relationship of medical support to the basic child support award, a matter which significantly affects the dollar amount of support awards in the state. In *Johnston v. Johnston*, the court awarded child support of $750 (approximately twenty percent of the payor's income) and medical insurance of approximately $200 for two children.[178] The court discussed whether this "4.23% variance" from the guidelines was justified and found that the chancellor made sufficient findings to "rebut the presumption that the guidelines are appropriate."[179] This discussion suggests that the statutory percentage includes the cost of medical insurance rather than that medical insurance is in addition to the basic support amount. On the other hand, in *Mixon v. Mixon*, the court approved as in compliance with the guidelines a $900 award of child support (twenty percent of adjusted income) without mentioning that the order also required payment of medical insurance premiums, life insurance premiums, and one-half of out of pocket medical expenses on top of the twenty percent.[180]

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[174] *See* MORGAN, *supra* note 5, § 3.01[a], at 3-4, table 3-6.

[175] *See* MISS. CODE ANN. § 43-19-103 (West 1993).

[176] MISS. CODE ANN. § 93-5-23 (Lexis Supp. 1999) provides, "In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support."

[177] § 43-19-103.

[178] 722 So. 2d 453, 462 (Miss. 1998).

[179] *Johnston*, 722 So. 2d at 462.

Then in *Kilgore v. Fuller*, the court of appeals acknowledged, without resolving, the confusion as to whether the statutory percentages include additional support items such as health and life insurance, transportation, and college expenses.[181] The court cited precedent supporting both positions, but did not adopt either position, stating throughout the opinion that the award was either twenty-two percent or twenty-seven percent, depending on whether the additional support items were included in the base figure.[182]

Resolution of this issue will make an enormous difference in the size of support awards in the state. In *Johnston*, for example, the monthly cash payment to the custodial parent would be $750 if medical insurance is an add-on to the basic support obligation of twenty percent. But if medical insurance is included in the twenty percent, the custodial parent would only receive $530 a month in cash.[183] Given the cost and importance of medical insurance and costs not covered by insurance legislative direction on this issue would be helpful. An amendment in compliance with the federal directive would, at a minimum, require that chancellors provide in the child support order for medical insurance if insurance is available to one of the parties at reasonable cost. The amendment should also address the relationship of medical insurance to the basic award.

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[180] 724 So. 2d 956, 962 (Miss. App. 1998).

[181] 741 So. 2d 351, 356 (Miss. App. 1999).

[182] *Kilgore*, 741 So. 2d at 355-58.

[183] *Johnston*, 722 So. 2d at 462.

2. College Education

The Mississippi Supreme Court held in 1960 that a parent's duty of support may include the duty to provide a college education if the child is qualified for a college education and the obligor is financially able to provide one.[184] Subsequent decisions established that the duty may be provided by agreement of the parties incorporated into the divorce decree, by order of the court in the original decree, or by order of the court modifying a decree silent on the matter.[185] An order to provide college support is not part of the basic child support award.[186]

Support for college does not extend past majority in the absence of an express agreement. A court may not order college support past the age of twenty-one.[187] However, parents may voluntarily assume an obligation for post-majority college support, either through an agreement incorporated into a divorce decree,[188] a separate contract,[189] or through an agreed modification.[190] A series of decisions have found express agreements in rather vague language regarding college support. In *Crow v. Crow*, the court found an obligation for post-majority college support stemming from an agreed order to pay "all reasonable college expenses."[191] In *Rogers v. Rogers*, the court held that an agreement by the father to support his child while in college required support beyond the age of twenty-one.[192] In a similar case, the parties agreed to a modification that provided that the father would be responsible for college expenses "of the minor children."[193] The court upheld the chancellor's ruling that the parties intended that the agreement would extend beyond the age of twenty-one.[194] Similarly, the court found an agreement to provide post-majority college support in a provision for "all educational expenses of [the children]."[195] The court rejected the payor's argument that the provision should be read in light of case law that a non-custodial parent is not required to provide post-majority support, so that an express agreement should be found only when the obligor expressly states that the agreement extends post-majority.[196]

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[184] Pass v. Pass, 118 So. 2d 769, 773 (Miss. 1960). The court held that its ruling was justified by the importance of a college education and the parent's obligation to the state as well as the child for "a well-equipped, à well-trained, and well-educated citizenship [sic]." *Id.* at 773.

[185] *See, e.g.,* Lawrence v. Lawrence, 574 So. 2d 1376, 1382-83 (Miss. 1991) (stating that material change in circumstances may necessitate court order for father to pay child's college expenses); Wray v. Langston, 380 So. 2d 1262, 1264 (Miss. 1980) (holding that it was not error for court to increase child support by $200/month to defray costs of college).

[186] *Lawrence*, 574 So. 2d at 1382.

[187] Stokes v. Maris, 596 So. 2d 879, 882 (Miss. 1992). A trial court "ha[s] no authority to order child support in any form, whether regular, college expenses, or otherwise, to continue in effect post majority." *Id. See also* Crow v. Crow, 622 So. 2d 1226, 1230 (Miss. 1993).

[188] *See Crow*, 622 So. 2d at 1230.

[189] *See* Nichols v. Tedder, 547 So. 2d 766, 770 (Miss. 1989).

[190] *See* Boleware v. Boleware, 450 So. 2d 92, 93 (Miss. 1984).

[191] *Crow*, 622 So. 2d at 1230.

While the premajority obligation to support a child in college includes living expenses, the scope of post-majority support is more limited. In *Meek v. Warren*, the court interpreted the meaning of an agreement for post-majority college support for "expenses incurred . . in obtaining a . . degree[]."[197] Rejecting the mother's argument that this agreement included expenses such as transportation, clothing, and other living expenses, the court held that, unless the agreement explicitly provided otherwise, post-majority support includes only tuition, room, board, fees, and educational essentials such as a computer, but not other living needs.[198] An agreement expanding post majority support was found in *Crow v. Crow*, where the father agreed to pay "$600 per month for the support [of the children] and all reasonable college expenses" and to pay hazard insurance and property taxes on the home and automobile insurance and tags while the children were in college.[199] The court upheld the chancellor's reading of this provision to extend the $600 child support post majority while the children were in college.[200]

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[192] 662 So. 2d 1111, 1114-15 (Miss. 1995).

[193] *Boleware*, 450 So. 2d at 92.

[194] *Id.* at 93. The father claimed that the support obligation ended when the child became twenty-one years old. *Id.*

[195] Mottley v. Mottley, 729 So. 2d 1289, 1289 (Miss. 1999).

[196] *Motley*, 729 So. 2d at 1290.

[197] 726 So. 2d 1292, 1293 (Miss. App. 1998).

[198] *Meek*, 726 So. 2d at 1294.

If the agreement for post-majority support does not specify a termination date, the court may order that support continue for a reasonable time. In *Rogers v. Rogers*, the court held that an agreement by the father to support his child while in college required support beyond the age of twenty-one.[201] Noting that the agreement was "extremely vague," the court encouraged attorneys to include specific provisions stating maximum support periods and academic performance requirements.[202] In the absence of such a provision, the court found that six years of college was reasonable since the child worked and went to school part-time.[203]

3. *Child Care*

In many states, child care is treated as an add-on to the basic support obligation similar to medical insurance and expenses. In some states, the costs of child care may be subtracted from the gross income of the noncustodial parent, reducing the income to which the basic support percentage is applied. Other states list child care as a deviation factor.[204] Mississippi does not specifically list child care as a deviation factor, although it could be included under "special needs of the child." After medical insurance, child care is one of the highest cost items a custodial parent incurs and could easily equal an award of child support in low-income families. The Mississippi legislature should consider including child care expenditures as an explicit add-on. In calculating an award for child care, it is important to consider and adjust for the federal tax credit for child care expenses, which is available to the custodial parent.[205]

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[199] *Crow*, 622 So. 2d at 1227.

[200] *Id.* at 1230.

[201] 662 So. 2d 1111, 1115 (Miss. 1995)

[202] *Rogers*, 662 So. 2d at 1115.

[203] *Id.*

[204] *See* Morgan, *supra* note 5, § 3.02[b], at 3-23 to 3-24.

F. Deviating from the Guidelines

The sections above set out the method for determining basic child support with permissible add-ons. In accordance with the federal mandate, the guideline amount is presumptively correct. However, if the particular circumstances of a case make application of the guidelines unjust or inappropriate, the court may deviate from the guidelines after a written finding explaining the reason for the deviation.[206]

1. Deviation Procedure

The court must begin by determining adjusted gross income and applying the proper percentage to arrive at child support, then proceed to examine the deviation factors justifying a different amount.[207] In *Knutson v. Knutson*, the court reversed an award of child support above the guidelines based upon a chancellor's failure to follow this procedure.[208] The trial court awarded child support of $4100 a month for six children, well above the statutory amount of twenty-six percent.[209] In doing so, the chancellor did make some findings with regard to the needs of the wife and children; however, he did not specifically refer to the child support guidelines in doing so.[210] The court reversed, stating that a chancellor should begin with the child support guidelines and then, if necessary, increase the amount of the award, giving specific reasons for doing so: "Since he did not reference the guidelines, clearly he did not make specific findings on why the application . . . would be unjust or inappropriate."[211] The requirement of findings applies equally in an uncontested action. In *Stinson v. Stinson*, the court reversed and remanded an order of child support entered against a defendant in an uncontested action because the chancellor did not explain the basis for the amount ordered.[212] Specific findings regarding the application of child support guidelines are also required in modification actions.[213]

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[205] I.R.C. § 21(a)-(b) (1994).

[206] 45 C.F.R. § 302.56(g) (2000). The federal regulations require that states establish deviation criteria: the particular criteria are selected by the state. *Id.*

[207] *See, e.g.,* Draper v. Draper, 658 So. 2d 866, 869-70 (Miss. 1995) (remanding case for findings because award was $350 rather than $495 shown by guidelines); Dufour v. Dufour, 631 So. 2d 192, 195 (Miss. 1994) (remanding case for "specific and complete findings" when award of support greater than that set forth in guidelines). *See also* Clausel v. Clausel, 714 So. 2d 265, 267 (Miss. 1998) (reversing award of child support above guidelines without specific findings).

[208] 704 So. 2d 1331, 1335 (Miss. 1997).

[209] *Knutson*, 704 So. 2d at 1334.

[210] *Id.* at 1335.

2. *Deviation Factors*

The deviation criteria established by the Mississippi guidelines include (1) extraordinary medical, psychological, dental, or educational expenses; (2) special needs of the child; (3) shared parental arrangements; (4) age of the child; (5) independent income of the child; (6) spousal support to the custodial parent; (7) total available assets of the parents; (8) seasonal variations in income or expenses of one or both spouses; and (9) any other adjustment needed to achieve an equitable result.[214]

a. *Extraordinary Medical Expenses*

The court in *Hoar v. Hoar* held that medical expenses in excess of medical insurance coverage are an extraordinary expense not covered by the basic, or regular, child support award.[215] Accordingly, the chancellor did not err in requiring appellant to pay one-half of all medical expenses in addition to regular child support.[216]

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[211] *Id.* at 1335. The Mississippi Supreme Court has reversed and remanded a number of cases in which a chancellor deviated from the guidelines without making findings explaining the deviation. *See supra* note 207.

[212] 738 So. 2d 1259, 1264 (Miss. App. 1999).

[213] Turner v. Turner, 744 So. 2d 332, 338 (Miss. App. 1999).

[214] MISS. CODE ANN. § 43-19-103 (1972).

[215] 404 So. 2d 1032, 1036 (Miss. 1981).

[216] *Hoar*, 404 So. 2d at 1036.

b. *Shared or Split Custody or Extensive Visitation*

Child support guidelines are based on the assumption that the noncustodial parent spends approximately twenty percent of his or her time with the child and does not provide a primary residence for the child.[217] Under this traditional arrangement, most expenses are borne by the custodial parent. Child support essentially reimburses the custodial parent for bearing the noncustodial parent's share of child expenditures. When parents share custody, or when the noncustodial parent has extended visitation, the noncustodial parent bears directly some of the expenses covered in the child support award. Studies indicate that as visitation approaches thirty-five percent, the noncustodial parent provides a primary home for the child, duplicating the custodial parent's expenditures for housing-related costs.[218] This does not mean, of course, that the custodial parent's expenses for housing are reduced. However, with regard to the other high-ticket items — food, entertainment, travel, and child care — the costs are shifted from the custodial parent to the noncustodial parent for the time the child spends in the second home.

Recognizing the shift in expenditures does not lead to a simple solution. The easy case is one in which the parents each spend fifty percent of their time with the children and have equal incomes. In that case, assuming they split unusual expenses, no child support should be ordered. Figuring an appropriate deviation in arrangements with an uneven split of time, and where incomes are not equal, is a challenge.

Some states provide for deviation when visitation reaches a defined percentage of time.[219] Others, in line with Mississippi, provide that shared parenting arrangements are a deviation factor without providing guidelines for determining the deviation. Most courts require a showing that the additional time spent with the noncustodial parent results in an increase in costs to the noncustodial parent and a corresponding decrease in costs to the custodial parent.[220]

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[217] *See* Morgan, *supra* note 5, § 3.03[a], at 3-31, n.91.

[218] *See* American Law Institute, Principles of the Law of Family Dissolution, Analysis and Recommendations, Tentative Draft No. 3, Part II (Apr. 8, 1988), Reporter's Notes, at 120-21.

[219] COLO. REV. STAT. § 14-10-115(8) (1999) (stating overnight visitation qualifies for deviation); D.C. CODE ANN. § 16-916.1(n) (1981) (stating that 40% of time with one parent qualifies for deviation); MICH. C.S.G. (stating that 128 days qualifies for deviation).

c. *Split Custody*

Where the parents each have custody of one or more children, support in some states is calculated by determining what the mother owes for the children in the father's custody, what the father owes for the children in the mother's custody, and then subtracting the lesser.[221] Other states, including Mississippi, simply provide that split custody is a deviation factor. In *Brocato v. Brocato*, the chancellor split custody of two children between the mother and father with neither ordered to pay child support.[222] The court recognized that deviation from the guidelines could be justified by the split custody arrangement since one of the statutory factors for deviation is the "particular shared parental arrangement."[223] Similarly, in *Polk v. Polk*, the court held that no child support was necessary, where the parents' incomes were roughly equal and each had custody of one child.[224]

d. *Increase in Support for Older Children*

In *Havens v. Broocks*, the court of appeals upheld an increase in child support above the statutory guidelines based upon evidence of increased needs of the teenage children.[225] The award provided for support of $250 a month, which was shown to be inadequate to cover educational and extracurricular activities of the teenage children.[226] The court noted that the statutory presumption may be overcome by showing application of the guidelines would be unjust because of "[t]he age of the child, taking into account the greater needs of older children."[227]

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[220] *See* Terpstra v. Terpstra, 588 N.E.2d 592, 595-96 (Ind. Ct. App. 1992); *In re* Marriage of Cray, 846 P.2d 944, 953 (Kan. Ct. App. 1993); Brazan v. Brazan, 638 So. 2d 1176, 1180 (La. Ct. App. 1994); Hoffman v. Hoffman, 870 S.W.2d 480, 483 (Mo. Ct. App. 1994).

[221] *See* MORGAN, *supra* note 5, § 3.03[b][1], at 3-35.

[222] 731 So. 2d 1138, 1144-45 (Miss. 1999).

[223] *Brocato*, 731 So. 2d at 1144.

[224] 559 So. 2d 1048, 1050 (Miss. 1990).

[225] 728 So. 2d 580, 583 (Miss. App. 1998).

e. Dependency exemption

The Tax Reform Act of 1984 established new rules governing allocation of federal dependency exemptions between divorced parents. The Act provided that the exemption belongs to the custodial parent, unless he or she signs a written declaration that they will not claim the exemption for a taxable year and the noncustodial parent attaches the declaration to his or her return for the year in question.[228] Custodial parents argued that the Act provided a tax benefit that could be voluntarily released but could not be divested by court order. In keeping with a majority of courts, the Mississippi Supreme Court has held that a court may, as part of a divorce decree, award the dependency exemption to the noncustodial parent and order the custodial parent to execute the necessary waiver.[229] The purpose of the 1984 act, to remove the IRS from divorce disputes, is not affected by allowing divorce courts to allocate the exemption. The court noted that the exemption may be much more valuable in the hands of a higher-income noncustodial parent than a low-income custodial parent, producing an increase in after tax income for the noncustodial parent and a corresponding increase in child support for the custodial parent.[230] The Court held that allocation should be decided on a case-by-case basis, that the custodial parent should be ordered to execute the release on a yearly basis, and that the yearly execution of the release must be contingent on the noncustodial parent's full payment of support obligations.[231]

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[226] *Havens*, 728 So. 2d at 583.

[227] *Id.* (quoting MISS. CODE ANN. § 43-19-103(e) (1972)).

[228] Tax Reform Act, 26 U.S.C. § 152(e) (1994).

[229] Nichols v. Tedder, 547 So. 2d 766, 777 (Miss. 1989).

[230] *Nichols*, 547 So. 2d at 777. In *Johnston*, the court upheld a chancellor's award of child support above the statutory guidelines in part because the noncustodial parent was awarded one of the tax exemptions. Johnston v. Johnston, 722 So. 2d 453, 461-62 (Miss. 1998).

A court may deviate from the guidelines based upon the court's decision to award the federal tax dependency exemption to the noncustodial parent.[232] The amount of deviation could arguably equal the tax savings to the noncustodial parent. Or, the court could calculate adjusted gross income with the exemption and apply the statutory percentage to the resulting higher adjusted gross income.

CONCLUSION

As a result of changes responsive to federal mandates, Mississippi child support awards are now fairly consistent within income groups. Parties can predict the amount of awards with relative certainty, in contrast to the guesswork required under the old discretionary standard. Extensive proof of the child's needs are unnecessary in most cases. Although the guidelines clearly improve the process and the end result of child support actions, some changes are needed to clarify the guidelines. Most importantly, the guidelines should be amended to require (1) that courts include medical insurance in child support awards if it is available at a reasonable cost and (2) that medical insurance and payment of out-of-pocket medical expenses are an add-on to the basic child support award.[233] The discretionary deduction from gross income for children living in the payor's home should be clarified in light of the Mississippi Supreme Court's interpretation of the statute.[234] Finally, the definition of gross income should make clear that child support payable to the noncustodial parent for other children is not included in gross income[235] and should state whether means-tested benefits are included in income.[236]

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[231] *Nichols*, 547 So. 2d at 777. The court recommended, in order to tie the release to support enforcement, that the waiver be executed on a yearly basis even though the Tax Code allows other methods. *Id.*

[232] *See Johnston*, 722 So. 2d at 462.

[233] *See supra* notes 163-81 and accompanying text. This is the approach taken by a majority of states. Typically, the cost of insurance is also deducted from gross income. *See supra* notes 172-73 and accompanying text.

[234] *See supra* notes 151-58 and accompanying text.

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[235] *Id.*

[236] *See supra* notes 64-72 and accompanying text.

THE LEGAL ASPECTS OF SCHOOL VIOLENCE: BALANCING SCHOOL SAFETY WITH STUDENTS' RIGHTS[*]

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John S. Hooks[***]

I. INTRODUCTION

The recent tragedies experienced by the communities of Pearl, Mississippi[1]; West Paducah, Kentucky[2]; Jonesboro, Arkansas[3]; Springfield, Oregon[4]; Littleton, Colorado[5]; and others[6] have led many school districts to focus more attention on both preventing and responding to violence in their schools. In this evolving area of the law, the goal of creating safe and orderly learning environments and the potential for school district liability demand that schools carefully assess threats of violence and determine appropriate responses.[7] Yet, in marshaling resources to curb aggression and violence in our nation's schools, policy makers, administrators, and teachers must balance the often competing demands for safer schools with the constitutional rights of their students. The goal of school safety cannot be achieved by compromising the con-

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[1] On October 1, 1997, two students were killed and seven wounded after sixteen-year-old Luke Woodham opened fire on students at Pearl High School. Before leaving home, Woodham had beaten and stabbed his mother to death. Woodham was convicted and sentenced to two consecutive life sentences for the murders of his two classmates and seven twenty-year sentences for assaulting the others who survived. In a separate trial, Woodham was sentenced to life in prison for murdering his mother.

[2] On December 1, 1997, three students were killed and five wounded by a fourteen-year-old boy as the students participated in a prayer circle at Heath High School.

[3] Four students and one teacher were killed and ten others wounded as

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Westside Middle School evacuated during a false fire alarm. Mitchell Johnson, thirteen, and Andrew Golden, eleven, shot at their classmates and teachers from nearby woods after sounding the alarm.

[4] Fifteen-year-old Kip Kinkel killed two students and wounded at least twenty-two others after he opened fire in the cafeteria of Thurston High School on May 21, 1998. Kinkel had killed his parents the preceding day. In September 1999, Kinkel pled guilty to four counts of murder and twenty-five counts of attempted murder with a firearm.

[5] In the nation's deadliest school shooting, Eric Harris, eighteen, and Dylan Klebold, seventeen, killed twelve students and one teacher and wounded twenty-three others at Columbine High School on April 20, 1999. At the end of their rampage, they turned their guns on themselves.

[6] Other incidents include, *e.g.*, two students and one teacher were killed and one wounded when fourteen-year-old Barry Loukaitis opened fire on his algebra class in Moses Lake, Washington on February 2, 1996. A principal and one student were killed and two others wounded by Evan Ramsey, sixteen, at his high school in Bethal, Alaska, on February 19, 1997. In Stamps, Arkansas, two students were wounded by Colt Todd, fourteen, as he hid in nearby woods and shot the students as they stood in a parking lot on March 24, 1998. A fourteen year old killed one teacher and wounded two students at a dance at James W. Parker Middle School in Edinboro, Pennsylvania, on April 24, 1998. In Fayetteville, Tennessee, one student was killed in the parking lot of Lincoln County High School on May 19, 1998, three days before he was to graduate. The victim was dating the ex-girlfriend of his killer, eighteen-year-old honor student Jacob Davis. In Taber, Alberta, Canada, one student was killed and another wounded on April 28, 1999, in the first fatal high school shooting in Canada in twenty years. Six students were injured at Heritage High School in Conyers, Georgia, on May 20, 1999, by a fifteen-year-old boy who was reportedly depressed after breaking up with his girlfriend. And in Mount Morris Township, Michigan, a six-year-old boy was accused of fatally shooting a first-grade classmate on March 1, 2000.

[7] In preventing and responding to school violence, school officials should consult their legal counsel to ensure consistency and compliance with the ever-changing landscape of the law.

stitutional guarantees of those who comprise our school communities.

This article explores the legal implications of many school-safety issues. Part I presents a general overview of the scope and extent of school violence, arguing that while America's schools are generally safe, school districts should work to decrease what violence does exist, and proactively develop and institute policies that prevent the escalation of violence in our nation's schools. Part II provides an overview of school-district liability for student injuries resulting from violence at school. Part III surveys anti-violence measures implicating the First Amendment, including dress codes, uniforms, and policies addressing hate speech. Part IV offers guidance to schools with respect to searches and seizures. Finally, Part V provides suggestions to schools interested in organizing and developing school-safety committees charged with the responsibility of formulating and proposing policies to curb and respond to school violence.

A. Overview of the Scope of Violence in America's Schools

"School House Hype?"–Are We Exacerbating the Problem by Overreacting?

Some suggest that widespread media coverage of recent school shootings has created public misperceptions that schools are more dangerous than they actually are.[8] According to this view, over-hyped perceptions of violence have lead to reactionary laws that are counterproductive and ignore the fact that America's schools are generally safe and that the vast majority of violence against students occurs away from school.[9]

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[8] *See, e.g.,* Vincent Schiraldi, *Hyping School Violence,* WASH. POST, Aug. 25, 1998, at A15; Jessica Portner, *Crisis Drills Make the Rounds, But Some Call It Overreaction,* EDUC. WK. ON THE WEB, (Sept. 9, 1998) <http://www.edweek.com/ew/current/01shoot.h187> (reporting that some juvenile-crime experts contend that school violence training sessions are "a poor use of education dollars and an overreaction to what are still extremely rare incidents").

[9] *See, e.g., Virginia Takes Aggressive Approach to School Safety, in* SCHOOL

Those arguing that schools are overreacting point out that the number of twelfth graders who reported being injured by a weapon while at school did not increase significantly between 1976 and 1996.[10] In fact, a recent study measuring trends in nonfatal violent behaviors among adolescents in the United States between 1991 and 1997 indicates "significant linear decreases" in aggressive behaviors such as fighting and carrying guns onto school property.[11] A survey of principals of schools with seventy-five percent or more of the student population living in poverty, showed significant reductions in the number of conflicts among students, in the use of drugs and alcohol among students, and in physical or verbal abuse of teachers.[12] Data from the National Crime Victimization Survey for 1996 indicate that incidences of violent victimization among adolescents are at their lowest levels since the survey instrument was revised in 1992.[13]

LAW NEWS 9 (June 11, 1999) (quoting Kent Willis, Director of Virginia's ACLU chapter: "There is no doubt that the governor's pronouncements [to make Virginia's schools safer] have propelled schools to act in irrational and overly restrictive ways."); Portner, *supra* note 8.

[10] UNITED STATES DEPARTMENT OF EDUCATION AND UNITED STATES DEPARTMENT OF JUSTICE, ANNUAL REPORT ON SCHOOL SAFETY (visited Feb. 28, 2000) <http//www.ed.gov/pub/annschoolrep98/chap2.html>.

[11] Nancy D. Brener et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States,* 282 JAMA 440 (Aug. 4, 1999) (finding that from 1991-97 the incidence of weapon carrying decreased thirty percent and the incidence of fighting decreased fourteen percent). The study also noted that declines in fighting and weapon carrying are "encouraging" and "consistent with declines in homicide, non-fatal victimization, and school crime rates." *Id.* at 445.

[12] NAT'L CTR. FOR EDUCATION STATISTICS, OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEPARTMENT OF EDUCATION, VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 23 (Mar. 1998) (discussing data for the 1996-97 school year as compared with data collected five years earlier). The percentage of principals, at schools reporting poverty levels of seventy-five percent or more, who cited physical conflicts among students as a problem declined from forty percent in 1990-91 to twenty-nine percent in 1996-97; alcohol use from twelve percent in 1990-91 to three percent in 1996-97; drug use among students, from thirteen percent to five percent; physical abuse of teachers, from six percent to one percent; verbal abuse of teachers, from twenty-four percent to thirteen percent. *Id.* at 79. For analysis of this survey, see Kevin Bushweller, *School Safety, Probing the Roots of Prevention of Youth Violence*, AM. SCH. BD. J., Dec. 1998, at A8-A12.

[13] Brener et al., *supra* note 11, at 445.

Despite recent tragedies, homicides in school are extremely rare events.[14] In fact, less than one percent of homicides and suicides among school-aged youth occurs on school grounds, while traveling to or from school or at school-sponsored events.[15] For the 1998-99 school year, twenty of America's 51.5 million public and private school students[16] and one of America's three million teachers died as a result of school-associated violent attack.[17] Fourteen of the twenty students who died from school-associated murders during the 1998-99 school year were victims of the Columbine High School shooting in Littleton, Colorado.

Despite decreases in some types of criminal activity on school campuses and at school events, and despite data showing that our nation's schools are relatively safe places, school violence remains a formidable obstacle to many school districts' goals of creating safe and orderly learning environments where students can achieve optimally. For example, there have not been significant decreases in the percentage of students (1) who feel too unsafe to go to school, (2) being threatened or injured with a weapon on school property, or (3) having property stolen or deliberately damaged at school.[18] One in ten public schools experienced one or more serious violent crimes such as murder, rape or other types of sexual battery, suicide, physical attack or fight with a weapon, or robbery during the 1996-97 school year.[19] Physical attacks or fights without a weapon led the list of reported crimes in public schools with about 190,000 such incidents reported for 1996-97.[20] Forty-five percent of elementary schools reported one or more violent incidents compared with seventy-four percent of middle and seventy-seven percent of high schools during 1996-97.[21] Additionally over 6000 students were expelled last year for bringing firearms or explosives to school.[22]

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[14] *Id.*

[15] S.P. Kachur et al., *School-Associated Violent Deaths in the United States, 1992 to 1994*, 275 JAMA 1729-33 (June 12, 1996).

[16] DR. RONALD D. STEPHENS, THE NATIONAL SCHOOL SAFETY CENTER'S REPORT ON SCHOOL ASSOCIATED VIOLENT DEATHS 20-25 (1999). During the 1998-99 school year, in addition to the twenty students who died of school-associated murder, there were also three school-associated suicides and one accidental death.

[17] *Id.* According to the survey,

> A school-associated violent death is any homicide, suicide, or weapons-related violent death in the United States in which the fatal injury occurred:
>
> > on the property of a functioning public, private or parochial elementary or secondary school, Kindergarten through grade 12, (including alternative schools);
> > on the way to or from regular sessions at such a school;
> > while person was attending or was on the way to or from an official school-sponsored event; or
> > as an obvious direct result of school incident/s, function/s or activities, whether on or off school bus/vehicle or school property.

Id. at 1. The report, though described as "unscientific," indicates a downward trend in the overall number of school-associated violent deaths as defined and reported by the survey.

Even though recent statistics suggest a downward trend in school-related violence, crime—both violent and nonviolent— continues to occur in America's public schools. Further, statistical evidence indicating reductions in the frequency of some types of school crime has not alleviated the fears of many students and their teachers.[23] School officials are, therefore, confronted with the enormous task of further decreasing the violence in our nation's schools while promoting an educational environment conducive to the learning process.

II. SCHOOL-DISTRICT LIABILITY

The potential for lawsuits against school districts and school personnel demands that schools carefully consider and constantly evaluate their safety policies and initiatives. Students have filed claims against school districts alleging violations of federal constitutional and statutory guarantees, as well as actions based on state tort law.[24]

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[18] Brener et al., *supra* note 11, at 445.

[19] NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 12, at 7.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Brener et al., *supra* note 11, at 445 (finding "no significant decreases in the percentage of students feeling too unsafe to go to school").

[24] For example, at least eighteen lawsuits based on various federal and state

A. *Actions Based on Federal Law*

Public schools and their employees may be held liable for violations of students' federally protected rights.[25] For example, students have claimed that safety measures designed to prohibit hate speech or gang-related clothing violate their First Amendment freedom of expression[26] and that certain measures designed to detect contraband violate their Fourth Amendment freedom from unreasonable searches and seizures.[27] School districts may also be found liable for maintaining a "hostile learning environment" in which students are sexually harassed in violation of Title IX.[28] Furthermore, stu-

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claims are now being prepared as the result of the Columbine massacre. Potential defendants include gun makers, the gunmen's parents, the school district and the sheriff's department. Some anticipate that parents will allege that school officials are liable because they did not undertake measures to prevent the shootings and because school security was inadequate. Robert Weller, *Parents Sue Each Other, School Over Massacre at Columbine Colorado Town Suffering Again, With Lawsuits*, Associated Press, TIMES-PICAYUNE (New Orleans), Oct. 24, 1999. *See also* Peter G. Chronis & Kevin Simpson, *Columbine Student Seeks $10 Million: Intent-to-sue deadline looms,* DENVER POST (Oct. 14, 1999) (reporting that one Columbine family's notice to sue the school district alleges that negligent lack of security at school allowed gunmen to enter school with weapons and bombs).

[25] *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 698-70 (1978) (holding that local governments, including school districts, are "persons" under § 1983 and, therefore, can be subjected to § 1983 liability).

[26] *See, e.g.,* Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459, 1460 (C.D. Cal. 1993) (describing student complaint that school dress code prohibiting the wearing of clothing identifying college or professional sports teams violated their First Amendment right to free speech). *See also* Bivens v. Albuquerque Pub. Schs., 899 F. Supp. 556, 561 (D.N.M. 1995) (holding dress code forbidding sagging pants did not violate student's First Amendment rights); Olesen v. Board of Educ., 676 F. Supp 820, 823 (N.D. Ill. 1987) (dismissing student complaint that ban on male earrings violated right of free speech and expression). For a general discussion of student-initiated First Amendment constitutional challenges, see *infra* Part III.

[27] *See, e.g.*, People v. Pruitt, 662 N.E.2d 540, 545 (Ill. App. Ct. 1996) (upholding use of metal detectors against student claim that use violated their Fourth Amendment rights against unreasonable searches and seizures); People v. Dukes, 580 N.Y.S.2d 850, 853 (N.Y. Crim. Ct. 1992) (holding same). For a general discussion of student-initiated Fourth Amendment constitutional challenges, see *infra* Part IV.

[28] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (1994).

dents who allege physical injuries resulting from school violence often claim violations of their substantive due process rights guaranteed by the Fourteenth Amendment.[29] Students commonly allege deprivations of these and other constitutional rights under 42 U.S.C. § 1983, which authorizes actions against local governments for alleged deprivations of federally-protected rights.[30]

B. School-District Liability Under § 1983

Although the Eleventh Amendment prevents states from being sued under § 1983, school districts, because they are not considered "arms of the state," can be held liable under § 1983.[31] A student, to hold a school district liable under §

See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (applying Title VII's sexual harassment principles in deciding Title IX action); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 622 (S.D.W. Va. 1998) (holding that claim of peer to peer sexual harassment under Title IX viable if school district had actual knowledge of the hostile environment and undertook no remedial measures); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (alleging peer-to peer sexual harassment). *See also* Diane M. Welsh, *Limiting Liability Through Education: Do School Districts have a Responsibility To Teach Students About Peer Sexual Harassment?* 6 AM. U. J. GENDER & LAW 165 (Fall 1997) (describing age-specific peer harassment prevention programs); Rebecca Jones, *"I don't feel safe here anymore,"* AM. SCH. BD. J. (visited Feb. 28, 2000) <http://www.asbj.com> (discussing the Office of Civil Rights' regulations enforcing Title IX that prohibit harassment and hate crimes of sexual nature against homosexual students).

[29] The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to jurisdiction thereof, are citizens of the United States and of the State within they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

U.S. CONST. amend. XIV, § 1.

[30] *See, e.g.*, Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 199 (5th Cir. 1994) (alleging violation's of decedent's rights as guaranteed by Constitution after student was killed by stray bullet); Engele v. Independent Sch. Dist. No. 91, 846 F. Supp. 760, 762 (D. Minn. 1994) (asserting Fourteenth Amendment violations of due process and equal protection when student was instructed to complete school year at his home for safety reasons).

[31] States are protected from litigation by the Eleventh Amendment to the

1983, must prove that the school, through its "final policymakers," acted under color of state law to deprive a student of a federally-protected right;[32] or the student must prove that the district's policymakers maintained a policy or custom that condoned or encouraged non-policymaking employees to violate the student's rights.[33] In other words, a student must show that the final policymaker acted under "color of law"[34] to deprive the student of his or her constitutional rights directly, as in the case of a school board that adopts a policy instituting unconstitutional searches or indirectly where policymakers are deliberately indifferent to students' constitutional rights by promoting or condoning a "custom or usage" of conduct on the part of non-policymaking employees depriving students of federally protected rights.[35]

United States Constitution: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Under this amendment, immunity only attaches to "States or governmental entities that are considered 'arms of the state.'" Will v. Michigan Dept. of State Police, 491 U.S. 58, 70 (1989) (citations omitted). Municipalities and local governmental units, however, "are not considered part of the State for Eleventh Amendment purposes." *Will*, 491 U.S. at 70. Therefore, local school boards are not protected by the Eleventh Amendment and may be subject to liability under § 1983. *See also Monell*, 463 U.S. at 665 (holding that local governments, including school districts, are "persons" under § 1983 and, therefore, can be subjected to § 1983 liability). *See also* Howlett v. Rose, 496 U.S. 356, 383 (1990); Mount Healy City Sch. Dist. v. Doyle, 429 U.S. 274, 280 (1977).

[32] A school district cannot be held liable under § 1983 for the acts of its employees under the theory of *respondeat superior. Monell*, 436 U.S. at 691 (concluding a "municipality cannot be held liable *solely* because it employs a tortfeasor. . . .").

[33] *See, e.g., Engele*, 846 F. Supp at 764 (holding that a "school district is liable under § 1983 only if an official policy or custom caused a violation of [a student's] constitutional rights").

[34] 42 U.S.C. § 1983 (1994). *See also* Robert C. Cloud, *Qualified Immunity for University Administrators and Regents*, ED. LAW REP. 561, 565 (Mar. 4, 1999) (stating that "[t]he obvious intent of the law is to discourage government officials from using the power of their offices to deny constitutional rights to others").

[35] *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994) (en banc), *vacating*, 975 F.2d 137 (5th Cir. 1992) (applying "deliberate indifference" standard to assess superior liability); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989) (using "deliberate indifference" standard to allow

1. *A School District Can Only Be Liable Under § 1983 for the Actions of Its "Final Policymakers" Who Must Either Directly Act "Under Color of State Law" To Deprive a Student of a Federally Protected Right or Condone a Custom or Usage To Deprive Students of Federally Protected Rights*

a. *Who Is a Final Policymaker?*

State law determines whether employees are "final policymakers" under § 1983.[36] In many states, the board of education has final policymaking authority in a school district.[37] But in some states, the superintendent or principal may have final policymaking authority. If superintendents or principals are final policymakers under state law, the district can be held directly liable for his or her actions. If the superintendent or principal is not a final policymaker under state law, the district can still be held liable if the district's policymakers condone impermissible behavior of the superintendents or principals that constitutes a "custom or usage" depriving students of their federally protected rights.

b. *Maintaining a "Custom or Usage" Manifesting Deliberate Indifference to Federally Protected Rights*

School districts may be sued under § 1983 for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval

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student's claim where band director retained after multiple sexual harassment allegations).

[36] St. Louis v. Praprotnik, 485 U.S. 112, 122-24 (1988).

[37] *See* Jett v. Dallas Indep. Sch. Dist., 7 F.3d 1241, 1245 (5th Cir. 1994) (finding that under Texas law, final policy-making authority in an independent school district rests with the district's board of trustees and not with the superintendent); Singer v. Denver Sch. Dist. No. 1, 959 F. Supp 1325, 1330 (Colo. 1997) (holding that, under Colorado law, termination of teacher lies within the responsibility of the board of education and not with the high school principal: "Where a board of education retains authority to review a decision, a delegation of final authority does not occur."). *But see* MISS. CODE ANN. § 37-9-14 (2000) (granting superintendents duty "to employ and dismiss noninstructional and nonlicensed employees as provided by law."). Section 31-9-14 calls into question *Yarbrough v. Camphor*, 645 So. 2d 867, 872 (Miss. 1994) which construed Mississippi law as vesting final authority to hire and fire employees with the board of education.

through the body's official decision making channels."[38] Under the custom and usage[39] rationale, an employee found liable for a § 1983 violation may render the district liable if school officials with final policymaking authority maintain "with impunity . . . a custom, practice or usage that communicated condonation or authorization of assaultive behavior."[40]

For example, in *Stoneking v. Bradford Area School District*, the student plaintiff asserted a § 1983 action against the school district, its superintendent, and the school's principal and assistant principal alleging sexual harassment by a school-district employee, Edward Wright.[41] The student claimed the principal (1) had been informed of Wright's previous sexual misconduct directed at another student, (2) had maintained a file containing reports and complaints against Wright by other female students, (3) created a policy whereby Wright would have no one-on-one contact with female students, and (4) that the principal, assistant principal, and superintendent "'failed to take any action to protect the health, safety and welfare of the female student body.'"[42]

Stoneking, the student, did not argue that the school district and Wright's supervisors were liable through respondeat superior.[43] Instead, Stoneking argued that the defendants themselves were liable

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[38] Monell v. Department of Soc. Servs., 436 U.S. 658. 690-91 (1978). Section 1983 provides that persons "shall be liable to the party injured" when they act "under color of any statute, ordinance, regulation, *custom*, or *usage*" thus depriving the party of "any rights, privileges, or immunities secured by the Constitution and [federal] laws." 42 U.S.C. § 1983 (1988) (emphasis added).

[39] "Congress included customs and usages" in § 1983, as noted by Justice Harlan, "because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to construe a 'custom or usage' with the force of law." *Monell,* 436 U.S. at 961 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

[40] Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 730 (3d Cir. 1989).

[41] *Stoneking*, 882 F.2d at 722.

[42] *Id.* The court found that Stoneking's alleged injuries resulted from the actions of a state employee who was "subject to [the school district's and named defendant's] immediate control." *Id.* at 724.

[43] *Id.* at 724-25. *See Monell*, 436 U.S. at 691 (holding that school district cannot be held liable under § 1983 for acts of its employees under theory of *respondeat superior*).

> because of their own actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers, in concealing complaints of abuse, and in discouraging students' complaints about such conduct [and that] these practices, customs or policies created a climate which, at a minimum, facilitated sexual abuse of students by [t]eachers in general, and that there was a causal relationship between these practices, customs or policies and the repeated sexual assaults against her by Wright.[44]

Stoneking's § 1983 claim was viable because she had alleged the "defendants, with deliberate indifference to the consequences, established and maintained a policy, practice, or custom that directly caused her constitutional harm."[45]

2. *Acting "Under Color" of State or Local Law*

A student must also prove the school district acted "under color" of state law or local law.[46] In other words, the alleged action must result from an official's misuse of power that he or she possessed by virtue of state law, and the alleged action was made possible only because the wrongdoer was "clothed with the authority of state law."[47] The official conduct of state and local officials, however, "is almost always found to have occurred under color of state law."[48] The fact that an official acted in violation of a state or local law does not automatically mean that his conduct was not under color of state law.[49] But an official's purely private acts, not the product of state authority, are not under color of state law.[50] The question whether the conduct of a public official who violates state or local law represents an exercise of state authority—which could bring the case within § 1983—or is purely private conduct—outside the scope of § 1983—is often difficult and necessarily fact-intensive.[51]

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[44] *Stoneking*, 882 F.2d at 724-25. *See* City of Canton v. Harris, 489 U.S. 378, 385-89 (1989) (holding that municipality may be liable under § 1983 when its policymakers made deliberate choice to follow course of action); *Monell*, 436 U.S. at 690-91 (holding that government body may be sued for constitutional deprivations visited pursuant to governmental "custom," "practices," or "usage").

[45] *Stoneking*, 882 F.2d at 725.

[46] "[G]enerally, a public employee acts under the color of state law while acting in his official capacity or where exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 50 (1988).

[47] Monroe v. Pape, 365 U.S. 167, 184 (1961), *overruled on other grounds by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

[48] MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION § 5.5, at 490 (3d ed. 1997).

3. *Deprivation of a Federally Protected Right*

Finally, a student must show that the school district deprived him or her of a federally protected right.[52] In the context of public education, the courts have recognized that students have constitutionally protected property and liberty interests including First Amendment freedoms of expression,[53] Fourth Amendment freedom from unreasonable searches and seizures,[54] the right to be free of sexual molestation,[55] the right to attend public schools,[56] and the right to be free from state-created dangers.[57] A school district, therefore, may be liable under § 1983 if policymakers act to deprive students of these or any other federally protected rights or if policymakers maintain a policy or practice that is deliberately indifferent to these or other constitutional rights.

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[49] *Id.*

[50] *Id.* at 493-94.

[51] *Id.* at 494-95 (citing Jojola v. Chavez, 55 F.3d 488, 494 (10th Cir. 1995) (ruling that custodian who sexually molested student did not act under color of state law)); Wilson v. Webb, 869 F. Supp. 496, 497 (W.D. Ky. 1994) (rejecting defendant public school teacher's claim that his alleged sexual harassment and molestation of plaintiff students was "purely private and unrelated to public office." The alleged wrongs "took place on school grounds, during school hours, and within the context of the unique teacher-student relationship").

[52] To bring "a constitutional claim for relief under section 1983, [a student must] allege a violation of a right secured . . . by the Constitution or the laws of the United States and a violation of that right by one or more state actors." Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994).

[53] *See* discussion of the First Amendment in public schools, *infra* at Part III.

[54] *See* discussion of the Fourth Amendment in public schools, *infra* at Part IV.

[55] Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 476 (5th Cir. 1994).

[56] Goss v. Lopez, 419 U.S. 565, 574 (1975) (expelling or suspending children from public schools amounts to deprivation of property and liberty interests that qualifies for protection under due process clause).

[57] *See* discussion at *infra* Part II(C)(2).

a. Personal Liability of School Administrators and Board Members Under § 1983

Board members, administrators, teachers, and other employees may be held *personally* liable for actually violating students' rights[58] or by promoting or condoning a custom or usage on the part of their subordinates that is deliberately indifferent to or deprives students of their federally protected rights. And, importantly, individuals sued in their personal capacities may be subjected to punitive damages even though punitive damages are not available against a school district under § 1983.[59]

In *Stoneking*,[60] for example, the student plaintiff claimed damages against the school district, as well as the superintendent, principal, and assistant principal in their personal capacities.[61] And in *Doe v. Taylor Independent School District*,[62] the Fifth Circuit held that administrators could be held personally liable for improperly supervising employees and articulated a test to determine supervisory liability in sexual abuse cases:

> A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes:
> (1) the defendant learned of facts or a pattern of inap-

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[58] In a personal-capacity suit, a plaintiff need not show a connection to a governmental policy or custom, if the plaintiff alleges injury as the direct result of the defendant's actions undertaken under color of state law. *See* SCHWARTZ & KIRKLIN, *supra* note 48, § 6.5, at 604-05.

[59] *Id.* at §6.6, at 606.

[60] Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989); *see supra* text accompanying notes 41-46.

[61] *Stoneking*, 882 F.2d at 725 (stating that "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates").

[62] 15 F.3d 443 (5th Cir. 1994).

> propriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
> (3) such failure caused a constitutional injury to the student.[63]

Stoneking and *Doe* make clear that school administrators and other employees have a duty to avoid actions or practices that demonstrate deliberate indifference toward the constitutional rights of students.

b. *Qualified Immunity*

Public school officials and other employees in their personal capacities are not protected by absolute immunity,[64] but instead must rely on qualified immunity when defending a § 1983 action.[65] If the school official did not violate "clearly established federal law," he or she is entitled to immunity.[66] The defense of qualified immunity, however, is rendered inapplicable if the defendant, acting under color of law, knew or should have known that his or her actions would violate a student's clearly-established federally protected rights.[67]

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[63] *Doe*, 15 F.3d at 454.

[64] *See* Robert C. Cloud, *Qualified Immunity for University Administrators and Regents*, 131 ED. LAW REP. 561, 562 (Mar. 1999). There are two types of immunity: official or absolute immunity, and qualified immunity. Absolute immunity, as created under common law, "protect[s] public officials from liability for any tort committed in the performance of their public duties." *Id.* Currently, absolute immunity is reserved for government officials—the United States President, legislators, judges, prosecutors, and executive officers engaged in adjudicative functions—"whose job functions or status mandate that they have complete protection from suit in order to perform their job effectively." Ashley Smith, Comment, *Students Hurting Students: Who Will Pay?*, 34 HOUS. L. REV. 579, 587 (1997). *See also* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (listing categories of public officials who have absolute immunity).

[65] *See, e.g.*, *Doe*, 15 F.3d at 449; Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

[66] *See* SCHWARTZ & KIRKLIN, *supra* note 48, at §9.13, at 336-37 (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)). The article states that "[t]he courts have disagreed about how the immunity defense should be handled procedurally, including whether any special pleading and motion burdens should be imposed upon the plaintiff." *Id.* There have, however, been recurring difficulties surrounding the question of whether the federal law was "clearly established" and sur-

Because qualified immunity is not merely an immunity from liability, but an immunity from suit, and because the question of immunity is a matter of law to be decided by the judge, the school official usually moves to have the issue of immunity resolved early in the process to avoid the burdens of trial, and often, pre-trial discovery.[68]

C. Student Injury Claims Under the Fourteenth Amendment: The Evolving Parameters of a School District's Duty To Protect Against Violence

While some safety measures implicate the First and Fourth Amendments, students who are injured from school violence often allege violations of their substantive due process rights guaranteed by the Fourteenth Amendment. Some commentators argue that schools failing to provide adequate security measures should be liable students are injured on school ground.[69] A school district's duty to provide due process

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rounding the procedure for determining immunity. *Id. See also* D. R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1367-68 (3d Cir. 1992) (analyzing school official's ability to use immunity as defense).

[67] *See* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 731 (3d Cir. 1989) (finding superintendent not liable because he had not affirmatively tolerated, condoned, or encouraged sexual harassment; the principal and assistant principal, however, were not immune because their conduct communicated condonation of the employee's misconduct).

[68] Barbara L. Horwitz, Note, *The Duty of Schools to Protect Students from Sexual Harassment: How Much Recovery Will the Law Allow?*, 62 U. CIN. L. REV. 1165, 1178-79 (1994).

[69] Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection From Violence*, 36 J. FAM. L. 627, 627-28 (1997); *see also* Smith, *supra* note 64, at 579; Diane M. Welsh, *Limiting Liability Through Education: Do School Districts Have a Responsibility to Teach Students About Peer Sexual Harassment?*, 6 AM. U. J. GENDER & LAW 165, 186 (1997) (advocating adoption of anti-harassment policies by schools to combat hostility).

Courts, however, have generally reached the opposite conclusion. *See, e.g.*, Genao v. Board of Educ., 888 F. Supp. 501, 505 (S.D.N.Y. 1995) (finding that "the provision of security in municipal public schools has repeatedly been found to be protections is currently being shaped by two controversial questions: (1) whether a school district has an affirmative duty to protect against third-party injuries and (2) whether a school district can be liable for student injuries if the school district acts to "create" the danger.

1. *No Affirmative Duty To Protect Against Injuries Inflicted by Third Parties*

The government does not have an affirmative obligation to protect its citizens unless it takes them into its custody and holds them against their will as with the incarceration of a prisoner[70] or the involuntary institutionalization of the mentally ill.[71] The duty to protect arises only when a state, through an affirmative exercise of its power, so "restrains an individual's liberty that it renders him unable to care for himself."[72] Therefore, due-process-clause protection is triggered only when a state restrains an individual's personal liberties, not when it fails to protect an individual's "liberty interests against harm inflicted by other means."[73]

In *DeShaney v. Winnebago County Department of Social Services,* the seminal case addressing local government liability for injuries caused by third parties, the Supreme Court held that a county department of social services did not violate Joshua DeShaney's substantive due process rights, even though the child protective agency knew that Joshua was probably the victim of child abuse and, therefore, was in jeopardy prior to his being severely beaten and permanently impaired by his father.[74] Because Joshua was not in the custody of the social

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a governmental duty, rendering the school immune from liability").

[70] Robinson v. California, 370 U.S. 660, 667 (1962) (requiring states to provide adequate medical care to incarcerated prisoners).

[71] Youngberg v. Romeo, 457 U.S. 307, 314-25 (1982) (requiring states to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others).

[72] Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 200 (1989).

[73] *Deshaney*, 489 U.S. at 200.

[74] *Id.* at 193.

services agency at the time he was injured, the State had no duty to protect him. "The Clause is phrased as a limitation on the State's power to act," according to the Court,

> not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[75]

The Supreme Court has not determined whether schools have a custodial relationship with their students sufficient to confer on schools the duty to protect students from injury. Most lower courts, however, have held that daytime attendance at a public school does not create a custodial relationship giving rise to a constitutional duty to protect students from harm, notwithstanding compulsory attendance laws.[76] Currently, therefore, under the Fourteenth Amendment's substantive due process clause, school districts generally have no affirmative duty to protect students from violence caused by third parties.

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[75] *Id.* at 195.

[76] *See, e.g.,* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (stating that "[w]e join every [other] circuit court that has considered the issue in holding that compulsory school attendance. . . does not create the custodial relationship envisioned by DeShaney"); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (holding that "state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates"); Maldonado v. Josey, 975 F.2d 727, 732 (10th Cir. 1992) (concluding "compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school"); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1367 (3d Cir. 1992) (concluding that compulsory attendance laws do not create special relationship under which state could be held liable); J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (holding that "[s]choolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them").

At least one court has found that compulsory attendance creates a duty to protect school children from the foreseeable risks of personal injury and death. *See* Lichtler v. County of Orange, 813 F. Supp. 1054, 1057 (S.D.N.Y. 1993). *Lichtler*, however, is easily distinguished from school violence claims as the injuries complained of in *Lichtler* were caused by a natural disaster (tornado and windstorm) and not by the tortious conduct of a third party.

2. *State-Created Danger Theory*

Even though school districts have no affirmative duty to protect students, students injured by third parties have argued that schools should be liable if they affirmatively act to create the danger that caused the injury or otherwise render the student more vulnerable to it. Support for this argument is often drawn from *DeShaney* where the Court indicated that the social services agency might have been responsible had it affirmatively acted to create the danger that ultimately left Joshua DeShaney mentally impaired: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[77]

A school district could be found liable, therefore, for knowingly placing a student in danger because once school districts act to render students more vulnerable to dangers "the due process clause of the [C]onstitution [holds] them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.'"[78]

But courts have been reluctant to find school districts liable under the state-created-danger theory. For example, in *Johnson v. Dallas Independent School District*, Andrew Gaston, a student at a Dallas, Texas, high school was shot and killed in a public-school hallway by a non-student trespasser.[79] The trespasser entered the school building without wearing a student identification badge as required by the school.[80] Further, the trespasser's handgun was not discovered because the school's metal detectors were not being used.[81] Despite the "apparent ineptitude and feckleness of the school district and school officials in ensuring student safety,"[82] the majority found the school district not liable, reasoning that "the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur."[83]

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[77] *DeShaney*, 489 U.S. at 201.

[78] Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994). *See, e.g.*, Murphy v. Morgan, 914 F.2d 846, 867-68 (7th Cir. 1990) (holding state could be liable of knowingly subjecting child to psychological damage when it removed her from her parents custody and placed her in foster homes in which she was molested and/or abused); White v. Rochford, 592 F.2d 381, 387 (7th Cir. 1979) (finding the state liable for injuries to minor children left on the roadside after driver of their car was arrested). *See also* Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989).

Other courts, however, have found reliance on the *DeShaney* comment to be without merit. *See, e.g., Dorothy J.*, 7 F.3d at 734 (concluding that the "one comment toward the end of the *DeShaney* opinion—'nor did [the state] do anything to render him any more vulnerable to [the risk of private violence]'" does not "signal the Supreme Court's approval of section 1983 liability whenever a state actor has increased the risk of harm from private sources").

In *D.R. v. Middle Bucks Area Vocational Technical School*, two female students alleged they were sexually assaulted two to four times per week for an entire semester in a unisex bathroom and the dark room of the school's graphic arts class.[84] Additionally, one of the students alleged that, although she informed the school's assistant director of the sexual misconduct, he did not institute corrective measures.[85] Based on these allegations, the students filed a § 1983 action contending their civil rights had been violated by the school.[86]

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[79] *Johnson*, 38 F.3d at 198.

[80] *Id.*

[81] *Id.* at 199. The dissenting opinion stated that

> [w]hile this story would be tragic in any school, the trauma is magnified in this case by the apparent ineptitude and fecklessness of the school district and school officials in ensuring student safety. School policy required students to purchase school identification badges, but there was no one to check them. The school also had metal detectors on the premises, but they were packed away in boxes. The majority opinion refuses to acknowledge that these security measures were aimed at preventing the precise incident that transpired on October 23, 1991.

Id. at 204 (Goldberg, J., dissenting).

[82] *Id.* (Goldberg, J., dissenting).

[83] *Id.* at 201.

[84] D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366 (3d Cir. 1992).

[85] *Middle Bucks Area Vocational Technical Sch.*, 972 F.2d at 1366.

[86] *Id.* The students claimed, in part, that the school had created the danger causing the violation of their constitutional rights by (1) failing to report the

The Third Circuit noted that "[l]iability under the state-created danger theory is predicated upon the States' affirmative acts which work to plaintiff's detriments in terms of exposure to danger."[87] Finding that the school's use of a unisex bathroom and dark room "did not subject [the students] to an inherently dangerous environment"[88] and that the school could not have foreseen the risk of sexual molestation based on "non-sexual pandemonium"[89] in the classroom, the court concluded that the school "did not create the plaintiff's peril, increase their risk of harm, or act to render them more vulnerable to the student defendant's assaults."[90] Instead, the court found that the plaintiffs' "harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence" needed to support liability under the state-created-danger theory.[91]

Importantly, the judges also acknowledged the "indefensible passivity" of the school official who was advised of the sexual misconduct but did not investigate the complaints or take remedial measures against them.[92] The school official's conduct, or lack thereof, showed nonfeasance but did not "rise to the level of a constitutional violation."[93] Relying on *DeShaney*, the court noted that "'[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.'"[94] But the school could not be held liable under the state-created-danger theory because it had not created or exac-

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alleged misconduct of other students to either their parents or the authorities, (2) inadequately training and supervising the instructor in charge of the classroom, (3) failing to demand proper conduct from the other students, and (4) failing to investigate and take remedial measures against the complained of "physical and sexual misconduct." *Id.* at 1373.

[87] *Id.* at 1374.

[88] *Id.* at 1375.

[89] *Id.* at 1374.

[90] *Id.*

[91] *Id.* at 1375.

[92] *Id.* at 1376.

[93] *Id.*

[94] *Id.* (citation omitted).

erbated the danger posed by the students.[95]

Johnson and *Middle Bucks Area Vocational Technical School* demonstrate the general reluctance of courts to extend the obligations of school districts under the "state-created-danger" theory and, more generally, the reluctance of courts to find school districts liable for injuries inflicted by third parties.

D. *Student-Injury Claims Under State Law*

Students have also initiated tort actions based on state-law claims such as negligence,[96] strict liability,[97] and failure to supervise.[98] Importantly, because each state has its own particular laws and statutory requirements, a school district must consult with its local counsel to determine its obligations and potential liabilities under state law.

In Mississippi, for example, the Mississippi Tort Claims Act (MTCA)[99] provides the exclusive remedy against a governmental entity or its employees for tortuous acts or omissions that give rise to a suit.[100] Under the MTCA, a school district is considered a "political subdivision" and "governmental entity"[101] and, therefore, cannot claim the defense of sovereign immunity for its acts or the acts of its employees, unless the conduct falls within a statutory exception.[102] For example, under Mississippi law, a school district and its employees, if acting within the course and scope of their employment or duties

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[95] *Id.* The court also acknowledged that it was "not [their] province to say what the state responsibility is or should [have been] in situations like the present. We do say that the Fourteenth Amendment does not automatically embrace such conduct." *Id.*

[96] *See* Kelly v. Lewis, 471 S.E.2d 583, 585 (Ga. Ct. App. 1996); Clark v. Jesuit High Sch., 572 So. 2d 830, 831 (La. Ct. App. 1990); Maness v. City of New York, 607 N.Y.S.2d 325, 326 (N.Y. App. Div. 1994).

[97] *Clark*, 572 So. 2d at 831 (denying student's action for strict liability when another student shot plaintiff at school).

[98] *See, e.g. Maness*, 607 N.Y.S.2d at 325, 326 (setting aside jury verdict in claim against city for failure to supervise when student was shot to death at school); Brownell v. Los Angeles Unified Sch. Dist., 5 Cal Rptr. 2d 756, 756 (Cal. Ct. App. 1992). *But see* Mirand v. City of New York, 637 N.E.2d 263 (N.Y. 1994) (finding board of education liable for failing to provide adequate supervision). *See generally* Bruce W. Smith, *Constitutional Liability of Schools and School Officials for Student Injuries*, *in* LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE, 33 National School Boards Association Council of Attorneys ed. (Mar. 1995).

[99] MISS. CODE ANN. § 11-46-7(1) (Supp. 1998).

[100] L.W. v. McComb Separate Mun. Sch. Dist., 1999 WL 682076, at *2 (Miss. 1999) (interpreting MISS. CODE ANN. § 11-46-7(1) (Supp. 1998)).

[101] MISS. CODE ANN. § 11-46-1(g)-(i) (Supp. 1998).

> shall not be liable for any claim . . . [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a [school district] or employee thereof, whether or not the discretion be abused.[103]

Therefore, in Mississippi, a school district may be immune from liability for its discretionary actions,[104] but not for those acts considered ministerial in nature.[105]

In *L.W. v. McComb Separate Municipal School District*, the student plaintiff—called J.A. by the court—was attacked and sexually abused by another student on school grounds after being dismissed from after-school detention.[106] Prior to the incident, two teachers heard the other student threaten J.A., but did not institute any responsive measures.[107] J.A.'s mother, L.W., filed suit against the district alleging negligence in failing to maintain a safe environment, to properly monitor its grounds, to properly supervise its students, to have a route of safe departure for detention students, and for other acts of negligence.[108]

The school district contended, and the Mississippi Supreme Court agreed, that "providing supervision, monitoring, and a safe environment" involve discretionary conduct.[109] The finding of "discretionary duties," however, did not render the school district immune from liability because, under Mississippi law, "schools have [a] responsibility to use ordinary care and take reasonable steps to minimize risks to students thereby providing a safe school environment."[110]

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[102] MISS. CODE ANN. § 11-46-5(1) (Supp. 1998).

[103] MISS. CODE ANN. § 11-46-9(1)(d) (Supp. 1998).

[104] *Id.* Namely, "[a] duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof." T.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995).

[105] *Noblitt*, 650 So. 2d at 1344. An act is ministerial "if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgement or discretion." *Id.* at 1344.

[106] L.W. v. McComb Separate Mun. Sch. Dist., 1999 WL 682076, at *1 (Miss. 1999).

[107] *L.W.*, 1999 WL 6582076, at *1.

[108] *Id.*

The court relied on section 11-46-9(1)(b) of the Mississippi Code, under which a government actor must abide by the "minimum standard of ordinary care" to be protected by the statutory immunity shield.[111] Under this statute, the court concluded, immunity exists only for state actors that use ordinary care while performing a statutory duty.[112] State actors failing to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute are not protected, however.[113]

Second, the court noted that Mississippi school districts have a statutory duty to "maintain appropriate control and discipline of students while the children are in their care."[114] The court considered this duty, because it is statutorily imposed, to be ministerial in nature. Therefore, "teachers and administrators . . . [would be] protected by sovereign immunity only if they used ordinary care in controlling and disciplining their students."[115] According to the court, the ministerial nature of section 37-9-69 "trumped" the immunity from discretionary conduct exception in section 11-46-9(1)(d) and, therefore, the school district could be held liable if it had not exercised a duty of ordinary care "to minimize risks of personal injury [and] to provide a safe environment."[116]

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[109] *Id.*

[110] *Id.* at *6.

[111] *Id.* (citing MISS. CODE ANN. § 11-46-9 (Supp. 1998) which provides:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid).

Id.

[112] *Id.*

[113] *Id.*

[114] *Id.* at *7 (citing MISS. CODE ANN. § 37-9-69 (Supp. 1998)). Section 37-9-69 of the Mississippi Code provides, in part, that superintendents, principals, and teachers have an affirmative duty to "hold the pupils to strict account for disorderly conduct at school, on the way to a from school, on the playgrounds, and during recess." MISS. CODE ANN. § 37-9-69 (Supp. 1990).

In another case from Louisiana, a student unsuccessfully alleged that a school was strictly liable or otherwise negligent for injuries to his eye after another student shot him with an automatic BB pistol.[117] In upholding the trial court's dismissal of the case, the Louisiana Court of Appeals noted the school could be liable for injuries resulting from hazardous conditions on its property only when the school had actual or constructive knowledge of those conditions.[118] Here, since the school did not know the student had a BB gun, it could not be held liable.[119]

Even though school districts have generally prevailed in actions against them for injuries resulting from violence, these court battles are very costly to defend. School districts should work diligently to enact safety measures that prevent student injury and avoid potential litigation wherever possible.

III. ANTI-VIOLENCE MEASURES IMPLICATING THE FIRST AMENDMENT

School districts attempting to promulgate policies regulating speech or expressive conduct are likely to face constitutional challenges because the First Amendment is almost always implicated. Students or parents of students often challenge speech-related policies designed to ensure and promote student safety, often contending the policies unconstitutionally infringe on their (or their child's) freedom of speech. For example, students have challenged the constitutionality of dress codes,[120] mandatory uniform policies,[121] the restricted use of political symbols,[122] and policies designed to prohibit "hate speech."[123]

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[115] *L.W.*, 1999 WL 682076, at *7.

[116] *Id.* at *9.

[117] Clark v. Jesuit High Sch., 572 So. 2d 830, 831 (La. Ct. App. 1990).

[118] *Id.* (citing Laneheart v. Orleans Parish Sch. Bd., 542 So. 2d 138, 140 (La. Ct. App. 1988)).

[119] *Id.* For another example of a failed state law claim, see Brownell v. Los Angeles Unified Sch. Dist., 5 Cal. Rptr. 2d 756, 761 (Cal. Ct. App. 1992) (denying relief for claim of negligent supervision as school district did not have duty to inspect property adjacent to school grounds for gang members).

A. *The First Amendment and Public Schools*

The language of the First Amendment is deceptively simple: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble."[124] In applying the First Amendment to public schools, courts have struggled to protect students' First Amendment liberties, while recognizing that school systems, in order to function efficiently, must effectuate policies that promote disciplined and orderly learning environments. While earlier cases appeared to strike the balance in favor of student expression, later cases have granted school districts considerable discretion in proscribing certain types of student expression.

The Supreme Court established the contours of a public school student's First Amendment right to freedom of expression in its landmark decision *Tinker v. Des Moines Independent Community School District.*[125] After the school district suspended three students for wearing black armbands to protest the Vietnam War,[126] the Supreme Court, examining the "collision" caused by the students' exercise of their First Amendment rights[127] with the rules promulgated by school authorities,[128] concluded that students and teachers did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[129] Nevertheless, schools have legitimate interests in maintaining order and discipline.[130] Accordingly, "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[131]

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[120] *See, e.g.,* Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459, 1461-62 (C.D. Cal. 1993) (holding dress code which prohibited students from wearing clothing which identified any professional sports team or college violated free speech rights of students).

[121] *See, e.g.,* Phoenix Elementary Sch. Dist. No. 1 v. Green, 943 P.2d 836, 839 (Az. Ct. App. 1997) (finding that dress code which forbade wearing of T-shirts bearing logos or expressing religious and political sentiments was reasonably related to legitimate pedagogical concerns).

[122] *See, e.g.,* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 504-05 (1969) (holding that prohibiting wearing of black arm band at school was unconstitutional).

[123] *See, e.g.,* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1169 (E.D. Wis. 1991) (noting that university rule prohibiting discriminatory epithets toward individuals was overbroad and vague).

[124] U.S. CONST. amend. I.

[125] 393 U.S. 503 (1969).

Simply stated, despite *Tinker's* admonition that students do not forfeit their constitutional liberties when they enter a school, the Court is willing to allow school officials to regulate speech, provided the speech would otherwise disrupt school activities.[132] The student's First Amendment right to expression, which is not left at the "schoolhouse gate,"[133] is balanced against the "comprehensive authority . . . of school officials" necessary to "prescribe and control conduct in the schools."[134]

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[126] *Tinker*, 393 U.S. at 504. School officials had adopted a policy prohibiting students from wearing armbands in anticipation of the armband wearing protest. *Id.* Under the policy, "any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband." *Id.*

[127] *Id.* at 507. The Court concluded that wearing of a black armband in protest was "akin to pure speech" and, therefore, was "entitled to comprehensive protection under the First Amendment." *Id.* at 505-06.

[128] *Id.* at 507.

[129] *Id.* at 506.

[130] *Id.* at 513.

[131] *Id.*

[132] *Id.* at 509.

[133] *Id.* at 506. In addressing student's rights, the *Tinker* Court stated:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

In *Tinker*, the Court struck the balance in favor of the students. First, the Court found that "the record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."[135] The students had "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."[136] Because the school district failed to "show[] that the students' activities [had or] would materially and substantially disrupt the work and discipline of the school,"[137] the Court held that the school's anti-armband policy violated the student's freedom of expression guaranteed by the First Amendment.[138]

In *Bethel School District No. 403 v. Fraser*,[139] the Court applied a different balancing test: "[T]he [student's] undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[140] In *Fraser,* school officials suspended a student, who gave a speech in support of a stu-

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Id. at 511.

[134] *Id.* at 507.

[135] *Id.* at 514.

[136] *Id.*

[137] *Id.* at 513.

[138] *Id.* at 514. In rendering this opinion, the Court followed Fifth Circuit precedent established by *Byars v. Burnside,* 363 F.2d 744, 749 (5th Cir. 1966), which held that a student's wearing of symbolic articles, including armbands, cannot be prohibited by a school district unless they "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

In other words, in *Tinker* the Court found no evidence that students who wore black armbands to protest the Vietnam War interrupted school activities or caused any classroom disorder. Accordingly, the Court held that school administrators were without discretion to deny students the opportunity to wear the armbands. *Tinker*, 393 U.S. at 514.

[139] 478 U.S. 675 (1986).

[140] *Fraser*, 478 U.S. at 681. *See Battle for Student Rights Could Defeat Landmark Ruling*, SCH. LAW NEWS 9 (June 11, 1999) (discussing modern challenges to *Fraser*).

dent-government candidate during a student assembly.[141] The speech included obscene language in violation of a school disciplinary rule prohibiting obscene language in the school.[142] The Supreme Court found that the speech contained "elaborate, graphic, and explicit sexual metaphor"[143] and upheld the suspension. But the Court did not wholly rely on *Tinker's* substantial disruption test. Instead, the Court focused on the educative role of public schools in society and their need to inculcate "fundamental values necessary to the maintenance of a democratic political system."[144] Coupling the school district's need to incorporate fundamental values with its "interest in protecting minors from exposure to vulgar and offensive spoken language,"[145] the Court concluded that the

> [s]chool [d]istrict acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. . . . The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would

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[141] *Id.* at 678.

[142] *Id.* The school policy stated: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

[143] *Id.* at 677-78. The speech, given before a voluntary assembly comprised primarily of fourteen year olds, included, for example, the following: "I know a man who is firm–he's firm in his pants, he's firm in his shirt, his character is firm–but most . . . of all, his belief in you, the students of Bethel, is firm." *Id.* at 687 (Brennan J., concurring).

[144] *Id.* at 683. The *Fraser* Court noted that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" and "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools." *Id.* [citations omitted]. Further, the Court concluded that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.*

See also id. at 681 (stating that "Public education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.") (quoting C. Beard & M. Beard, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[145] *Id.* at 684.

undermine the school's basic educational mission.[146]

Fraser illustrates the deference the Court is willing to give school administrators in proscribing student speech that is not considered purely political. The *Fraser* Court, unlike the Court in *Tinker,* did not require school officials to prove that student speech disrupted school activities before discipline of the student was allowed. Instead, school officials in *Fraser* were deemed to have the inherent authority to regulate student speech because they perceived it to include "vulgar and offensive terms in public discourse."[147]

A third case, *Hazelwood School District v. Kuhlmeier,*[148] further expanded a school district's constitutional ability to control the content of student speech. In *Hazelwood,* high school students, who were also staff members of the school newspaper, filed suit against the school claiming their First Amendment rights were violated when the principal deleted two pages of text from the paper.[149] The Supreme Court, however, disagreed. The Court distinguished *Tinker* as applying to a student's "personal expression that happens to occur on the school premises"[150] from instances where student expression might reasonably be perceived to bear the "imprimatur of the school" or "fairly be characterized as part of the school's curriculum."[151] In determining that school officials did not infringe the First Amendment rights of the students in editing the newspaper, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[152]

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[146] *Id.* at 685.

[147] *Id.* at 683.

[148] 484 U.S. 260 (1988).

[149] *Kuhlmeier,* 484 U.S. at 262. The principal deleted two articles. *Id.* The first described the teenage pregnancies of three students at the high school, and the second discussed the impact divorce had on actual students. *Id.* at 263.

[150] *Id.* at 271.

[151] *Id.*

[152] *Id.* at 273.

Together, *Tinker*, *Fraser*, and *Hazelwood* establish that school districts may limit speech that school officials determine is either disruptive to the educational environment,[153] "offensively lewd and indecent,"[154] or may be perceived as sponsored by the school.

B. *Student Dress Codes and the First Amendment*

The presence of gangs and gang-related activity is often targeted as a source of school violence.[155] Recognizing that gang-identity is often reflected in clothing has prompted many school districts to adopt policies restricting a student's right to wear certain articles and styles of clothing.[156] To combat the gang-related "world of identification, status, and symbolism,"[157] school dress codes often forbid students from wearing gang-related items including "jewelry, insignias, baseball caps, gloves, bandannas, shoelaces, and clothing that is all the same color, particularly red or blue."[158] While some school dress codes merely proscribe certain gang-related articles, other school districts have gone further by adopting mandatory uniform dress policies.[159]

School districts have implemented dress codes with the stated purpose of (1) redirecting the "focus of the classroom away from fear, violence, and intimidation"; (2) protecting innocent non-gang bystanders; and (3) promoting a school environment that is conducive to learning.[160] However, these same codes have been challenged by students or their parents who contend that dress codes that proscribe certain gang-related clothing or mandate that students wear uniforms unconstitutionally infringe on a student's First Amendment rights to freedom of speech and expression.[161]

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[153] *Tinker*, 393 U.S. at 514.

[154] *Fraser*, 478 U.S. at 685. The Court stated that "[w]e hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.*

[155] *See generally* Alison M. Barbarosh, Comment, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students First Amendment Rights?,* 28 LOY. L.A. L. REV. 1415 (1995) (discussing use of dress codes to eliminate gang activity); Paul D. Murphy, Note, *Restricting Gang Clothing in Public Schools: Does a Dress Code Violate a Student's Right of Free Expression?,* 64 S. CAL. L. REV. 1321 (1991) (same); Alyson Ray, Note, *A Nation of Robots? The Unconstitutionality of Public School Uniform Codes*, 28 J. MARSHALL L. REV. 645 (1995) (same).

[156] Barbarosh, *supra* note 155, at 1418. Additionally, gang members also identify members of rival gangs based on style and color of clothing. Therefore, "[w]hen a nongang member wears gang-related apparel in the color of a particular gang, that student may also unwittingly become a target of violence." *Id.*

[157] Ray, *supra* note 155, at 649 n.29 and accompanying text.

[158] Murphy, *supra* note 155, at 1323-24.

[159] Barbarosh, *supra* note 155, at 1441, 1421 nn.59-60.

The Supreme Court, while recognizing that First Amendment speech-related freedoms extend beyond written and verbal communication to include expressive conduct,[162] has never recognized an individual's freedom of speech to be absolute.[163] However, students who raise constitutional challenges to dress-code restrictions imposed by public schools often contend that their right to speak and express themselves through their choice of clothing has been violated.[164] Legally, the issue is whether wearing clothes or particular items that might symbolize gang affiliation constitutes "speech" and, if so, whether schools can prohibit students from wearing such clothing.

Of course, students often express themselves through their choices of clothing. Dress codes, therefore, regulate expressive conduct.[165] First Amendment protection of expressive conduct, however, extends only to conduct that is "sufficiently imbued with the elements of communication."[166] Therefore, before a style of dress would be considered "speech" for First Amendment purposes, a student must intend to "'convey a particularized message'" by his choice of clothing and that "'the likelihood was great that the message would be understood by [the students or educators] who viewed it.'"[167] But even if the style in which a student dresses is found to be protected expressive conduct, conveying a particularized message that was likely to be understood by those who viewed it, the student's conduct may nevertheless be prohibited if it substantially disrupts the educational process under *Tinker*.[168]

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[160] Murphy, *supra* note 155, at 1321, 1324. *See also* Ray, *supra* note 155, at 645 n.2 (listing several school districts that have adopted dress codes to attempt to provide safer learning environments).

[161] *See, e.g.,* Bivens v. Albuquerque Public Schs., 899 F. Supp. 556, 558 (D.N.M. 1995); Olesen v. Board of Educ., 676 F. Supp. 820, 821 (N.D. Ill. 1987). *See also* Murphy, *supra* note 155, at 1321.

[162] *See* Barbarosh, *supra* note 155, at 1423-24 (citing Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines Indep. Community Sch. Dist, 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968)).

[163] *Id.* at 1425 (citing Konigsberg v. State Bar, 496 U.S. 36 (1961)).

[164] *See, e.g.,* Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459 (C.D. Cal. 1993) (stating that students thought that dress code restricted, prevented, deprived, and denied their First Amendment right to free speech).

[165] *See infra* notes 167, 168, and accompanying text.

[166] Spence v. Washington, 418 U.S. 405, 409 (1974).

Central to the Supreme Court's decision to protect student "speech" in *Tinker* was the recognition that, by wearing black armbands to protest events in Vietnam, students did not cause "substantial disruption of or material interference with school activities."[169] Therefore, under the *Tinker* standard, courts will likely find a dress code constitutional if school officials can show the code is (1) reasonable, (2) related to the educational process, and (3) necessary to prevent substantial and material disruption or interference with school activities.[170] In other words, if school officials can show that gang-related attire causes "substantial disruption of or material interference with school activities" the dress code will likely pass the *Tinker* standard.[171] Two federal courts have offered insight into what a school district must show in order to prove that its anti-gang dress code is constitutional.[172] Both cases draw from principles established by the Supreme Court in *Tinker* and *Fraser*.

In *Jeglin v. San Jacinto Unified School District*, a federal district court upheld, in part, a dress code that prohibited students from wearing clothing identifying any college or professional sports team.[173] While the students contended the policy violated their First Amendment rights,[174] school officials alleged that gang members wore clothing with sports or college logos to signify gang membership.[175] The court found that the school district's allegation alone was insufficient to justify the dress policy.[176] Instead, the court concluded that "[t]o impose discipline resulting from a public school student's use of free speech[177] under the First Amendment school officials have the burden to show justification for their actions."[178]

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[167] Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11).

[168] Murphy, *supra* note 155, at 1322.

[169] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969).

[170] *See* Murphy, *supra* note 155, at 1344-45.

[171] *Tinker*, 393 U.S. at 514.

[172] *See* Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459, 1461 (C.D. Cal. 1993); Olesen v. Board of Educ., 676 F. Supp. 820, 822 (N.D. Ill. 1987).

The court upheld the policy with respect to the district's high school students because the school board was able to prove a gang presence with the potential to disrupt school activities.[179] In contrast, the policy was found unconstitutional with respect to elementary school students because the school board could not justify the dress code by showing a gang presence in the lower grades.[180] Similarly, the policy was struck down as it pertained to middle school students because the school district's evidence only showed a "negligible presence" of gang-related activity that created "no actual or threatened disruption of school activities" in the schools involved.[181]

Jeglin, therefore, applied *Tinker's* "substantial disruption test."[182] First, the court noted that "a student's free speech right may not be abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[183] Because the school district was able to demonstrate a "gang presence" in the high school and the potential for the disruption of school activities[184] school officials were permitted to proscribe certain clothing that might have signified gang membership or support because of disruptions stemming from gang activity.

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[173] *Jeglin*, 827 F. Supp. at 1463. The code essentially denied all students in the district "the right to wear clothing bearing writing, pictures or any other insignia which identifies any professional sports team or college on school district campuses or at school district functions." *Id.* at 1460.

[174] *Id.* at 1461.

[175] *Id.* at 1462.

[176] *Id.* at 1461.

[177] *Id.* The *Jeglin* court found that a student's wearing of logos and insignia to show support for professional and college sports teams was considered "speech" for First Amendment purposes. *Id.*

[178] *Id.*

[179] *Id.* at 1462 (finding that the school board had "carried [its] burden of showing both a gang presence . . . and activity resulting in intimidation of students and faculty that could lead to disruption or disturbance of school activities. . . . ").

[180] *Id.*

[181] *Id.*

[182] *Id.* at 1461.

In a second case, *Olesen v. Board of Education of School District No. 228*, a federal court upheld a dress code that prohibited male students from wearing earrings.[185] A senior-high-school student, Olesen, claimed the dress code violated his right to free speech and expression.[186] The court found, however, that the only message Olesen was attempting to communicate was one of "individuality" and, therefore, "not within the protected scope of the First Amendment."[187] Additionally, the court noted that "the First Amendment does not necessarily protect an individual's appearance from all state regulation," but to be found constitutional the regulation must be rationally connected to "the accomplishment of a public purpose."[188] Here, the court found the school district's policy both rational[189] and constitutional.[190]

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[183] *Id.*

[184] *Id.* at 1462.

[185] Olesen v. Board of Educ., 676 F. Supp. 820, 821 (N.D. Ill. 1987).

[186] *Olesen*, 676 F. Supp. at 821.

[187] *Id.* at 822.

[188] *Id.*

[189] *Id.* at 823. The court found the policy was rationally related to a public purpose because it was "directly related to the safety and well-being of its students" through the "curtailment of gang activities." *Id.* at 822-23.

[190] *Id.* The court noted that previous cases dealing with attempts to regulate student's hair length had been struck down because they dictated a student's appearance both inside and out of school. *Id.* at 823. Here the court found the student could easily remove the earring during school hours, and, therefore, the policy did not unconstitutionally "curtail a student's freedom to choose his own appearance." *Id.*

The *Olesen* court found the school's dress policy did not violate the student's First Amendment rights because the wearing of an earring was not considered

Cases addressing the constitutionality of student dress codes implemented to prevent gang-related violence give important guidance to school administrators in fashioning policies that are likely to pass First Amendment scrutiny:

- School officials should not attempt to justify the adoption of a dress code by referencing gang activity, unless the area has a true gang problem or evidence shows the likelihood of a gang problem developing;
- schools that do have gang problems should make detailed findings documenting the problems and disruptions caused by gang activity—this is essential under the *Tinker* analysis, which demands that "material and substantial interference" be shown before speech can be proscribed[191];
- the dress codes must be adaptable to changing styles while providing students accurate notice of what is prohibited "gang regalia"—so long as new provisions are specifically explained to students before implementation, codes will probably not be considered unconstitutionally vague[192];
- to prevent possible due-process violations schools

"speech." *Id.* at 822. The court, however, could have reached the same conclusion by applying the *Tinker* analysis adopted by the *Jeglin* court. In *Olesen*, as in *Jeglin*, the school district alleged a connection between the dress policy and gang involvement. Specifically the school board in *Olesen* alleged that males wore earrings to signify gang membership. *Id.* Additionally, the school board showed that gang-related violence occurred on school grounds, thus satisfying the *Tinker/Jeglin* standard. *Id.* at 821.

Olesen also relied heavily on the notion that schools have the "responsibility to teach not only English and History, but the role of young men and women in our democratic society." *Id.* at 822. This is similar to the approach taken by the Supreme Court in *Fraser*, which permitted school administrators to punish a student's lewd and indecent speech because, in part, the school district had a responsibility to "prepare pupils for the citizenship in the Republic." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[191] *Jeglin*, 827 F. Supp. at 1460-63.

[192] *Id.* at 1462. The *Jeglin* court stated that "it assume[d] that in carrying out their duties [school districts] will recognize and from time to time review their encroachments on First Amendments rights of their student population and revise any restrictions to conform to the existing situation." *Id.*

should implement an effective appeals process.[193]

C. School Uniforms

Despite *Tinker's* admonition that "students are entitled to freedom of expression of their views,"[194] policies requiring school uniforms—the most restrictive dress code of all—have not been found unconstitutional.[195] School districts are increasingly adopting policies mandating or encouraging students to wear uniforms, and there appears to be a growing trend favoring uniforms. Even President Clinton has supported the use of school uniforms as a means to combat school violence.[196] School administrators and teachers claim that uniforms have improved school climate and student behavior.[197]

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[193] *See* Goss v. Lopez, 419 U.S. 565, 584 (1975).

[194] Tinker v. Des Moines Indep. Community Sch. Dist, 393 U.S. 503, 514 (1969).

[195] *See* Phoenix Elementary Sch. Dist. No. 1 v. Green, 943 P.2d 836, 840 (Ariz. Ct. App. 1997) (upholding the constitutionality of a mandatory uniform policy in public middle school). *See generally* Ann L . Majestic, *Student Dress Codes in the 1990s, in* LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE 55 (National School Boards Association Council of School Attorney ed., Mar. 1995) (tracing education of judicial treatment of student dress restrictions); M. Sue Stanley, *School Uniforms and Safety*, 28 EDUC. & URBAN SOC'Y 424 (1996) (listing several school districts that have experimented with school uniform policies). *See also* Philip T.K. Daniel, *Violence and the Public Schools: Student Rights Have Been Weighed in the Balance and Found Wanting*, 27 J.L. & EDUC. 573, 578 (Oct. 1998) (stating "[t]he regulation of student expression by school authorities has been strengthened in more recent years as courts have given greater deference to administrative decisions"); Mary Ellen Simonson, *School Uniforms: A Blueprint for Legal Challenges*, INQUIRY & ANALYSIS (NSBA Council of School Board Attorneys, Alexandria, Va. (Mar. 1998), at 1-7 (discussing legal strategies available to school districts defending mandatory uniform policies); Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, BYU EDUC. & L.J. 147, 168-70 (1998) (concluding mandatory uniforms constitutional after examining First Amendment implications).

[196] President Clinton asked the Justice Department and the Department of Education to establish guidelines for implementing uniform policies in public schools. He the instructed the Secretary of Education to send a *Manual on School Uniforms*, United States Department of Education (1996), to every school district in the country in March 1996. For a copy of the complete manual, telephone 800-624-0100. The full text is also available through the United States Department of Education World Wide Web site at <http://www/ed.gov/updates/uniforms.html>.

[197] *See* Dena M. Sarke, *Coed Naked Constitutional Law: The Benefits and*

For example, after instituting a uniform policy at Ruffner Middle School in Norfolk, Virginia, leaving class without permission decreased forty-seven percent, throwing objects decreased sixty-eight percent, and fighting decreased thirty-eight percent.[198] Staff attribute these changes, in part, to the adoption of a uniform code.[199]

The constitutionality of mandatory uniform policies has been the subject of considerable debate.[200] Commentators opposed to school uniforms contend that uniforms, unlike measures designed to limit particular items of clothing, deprive students of *any* opportunity to express *any* message through their choice of clothing.[201] Therefore, these opponents argue that a uniform dress code fails a strict scrutiny based constitutional analysis because the government can implement a less-restrictive alternative than mandatory uniforms: Schools can prohibit specific items of clothing rather than requiring uniforms.[202]

Some uniform proponents argue that wearing clothing, like the student's earring in *Olesen*,[203] is not a form of "speech" protected by the First Amendment.[204] They contend that the right to express one's "individuality" through clothing is general and can be distinguished from the wearing of armbands to protest a war, the type of political speech that the Supreme Court protected in *Tinker*.[205] Other proponents have argued

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Harms of Uniform Dress Requirements in American Public Schools, 78 B.U.L. REV. 153, 154-55 n.9 (1998).

[198] UNITED STATES DEPARTMENT OF EDUCATION, MANUAL ON SCHOOL UNIFORMS 6 (1996).

[199] *Id.*

[200] *Compare* Barbarosh, *supra* note 155, at 1415 and Ray, *supra* note 155, at 645 (arguing mandatory uniform codes are probably unconstitutional) *with* Sarke, *supra* note 197, at 175 (concluding that "[a]lthough school uniforms alone cannot solve the problems facing our schools today, they may . . . be one beneficial step toward improving the public school environment").

[201] Barbarosh, *supra* note 155, at 1437-39.

[202] *Id.* at 1438 & nn.216-19, 1438.

[203] *See supra* notes 185-93 and accompanying text.

[204] For an excellent summary of the legal arguments favoring uniforms, see Simonson, *supra* note 195, at 1-7.

[205] *See supra* notes 125-38 and accompanying text.

that "uniform dress codes [are] content neutral since [their] goal is to provide a safe and effective learning environment through a means unrelated to the speech's content."[206] Importantly, even if uniforms are found to infringe on student "speech," those defending the uniform policies may argue that they are constitutionally permissible because schools have a compelling interest in instituting uniform policies to curb gang violence, maintain order and discipline, and to "inculcate" fundamental civic and social values.[207]

One key in avoiding constitutional challenges to uniform policies, as with many school policies aimed at reducing violence, is to involve parents and students early. According to some researchers, parents have been one of the leading champions for school uniforms in recent years because they perceive uniforms as contributing to greater discipline and control in their children's schools.[208] School officials should also give careful consideration to other policy issues when deciding whether to implement a restrictive dress code policy or a mandatory school uniform dress code.[209]

D. *The Constitutionality of Regulations Designed To Limit Hate Speech*

Generally, regulating what students say is even more difficult than regulating what they wear. School officials, however, may attempt to limit student speech by adopting and implementing student speech codes. The constitutionality of these codes is determined, in part, by the age of the affected students. While many college and university-sponsored speech codes have been found unconstitutional,[210] school administrators have had considerably more discretion in restricting student speech in public elementary and secondary schools.[211] Several authorities have argued that student speech codes regulating "hate speech" are constitutional provided certain guidelines are followed.[212] What seems clear is that disruption-causing student speech can be prohibited under *Tinker*, particularly if the school district is able to document a history of disruptions related to the speech sought to be regulated.[213] For example, courts applying the *Tinker* disruption standard have held that the use of the Confederate flag, the song "Dixie," and the name "Rebels" at school functions can be constitutionally prohibited because of their history of causing disruptions in the particular schools involved.[214] What seems less clear is

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[206] Barbarosh, *supra* note 155, at 1439.

[207] *See* Bethal Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[208] *See* UNITED STATES DEPARTMENT OF EDUCATION, MANUAL ON SCHOOL UNIFORMS (1996).

[209] Examples of policy considerations include the age of the students, the prevalence of gang-related activity in the school district, the financial abilities of the student's parents, whether the policy will be mandatory or voluntary, and whether students will be allowed to opt out of the restrictions.

[210] *See, e.g.,* Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.,

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993 F.2d 386, 393 (4th Cir. 1993) (holding student speech code unconstitutional); UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1174 (E.D. Wis. 1991) (holding student speech code unconstitutional); Doe v. University of Michigan, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989) (finding student speech code prohibiting "stigmatizing or victimizing" speech on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status as unconstitutionally overbroad). For an overview of cases and issues relating to hate speech regulations, see Brian C. Shaw, *Regulating Hate Speech in Public Schools, in* LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE 45 (National School Boards Association Council of School Attorneys ed., Mar. 1995).

[211] *See Fraser*, 478 U.S. at 682-83. *See also* Adam M. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulation of Fighting Words and the Consequences If They Do Not*, 28 AKRON L. REV. 187, 200 (1995) (stating that "[t]he Court has been willing to allow high schools and grammar schools to regulate speech so long as they can show it will disrupt school activities").

[212] Milani, *supra* note 211, at 202-03 & n.135, 144. *See generally* Gordon Danning, *Freedom of Speech in Public Schools: Using Communication Analysis to Eliminate the Role of Education Ideology*, 19 HASTINGS L.Q. 123 (1991); Alison G. Myrha, *The Hate Speech Conundrum and the Public Schools*, 68 N.D. L. REV. 71 (1992); Richard Vacca & H.C. Hudgins, Jr., *Student Speech and the First Amendment: The Courts Operationalize the Notion of Assaultive Speech*, 89 EDUC. L. REP. 1 (1994); David Schimmel, *Are "Hate Speech" Codes Unconstitutional? An Analysis of* R.A.V. v. St. Paul, 76 EDUC. L. REP. 653 (1992); David Tatel et. al., *The 1991-92 Term of the United States Supreme Court and its Impact on Public Schools*, 78 EDUC L. REP. 3 (1992).

[213] *See* Shaw, *supra* note 210, at 51.

[214] In *Augustus v. School Bd. of Escambia*, the court noted that the use of Confederacy-related items had previously caused four violent interracial confrontations. Augustus v. School Bd. of Escambia, 507 F.2d 152, 155 (5th Cir. 1975)

how to regulate instances in which offensive or hateful student speech does not lead to disruption of the educational environment. Under *Fraser*, school administrators may argue that they have a duty to regulate speech in order to prepare students "for citizenship in the Republic" and in order to "inculcate [students with] the habits and manners of civility."[215]

Regulating offensive speech that neither causes disruption of the educational mission of the school, nor occurs in a school sponsored forum, continues to pose special problems for school districts attempting to formulate hate-speech policies. But school administrators formulating hate-speech policies may benefit from *Fraser's* expanding scope. For example, in *Bystrom v. Fridley High School, Independent School District No. 14,*[216] the Eighth Circuit Court of Appeals upheld the suspension of several high school students who distributed a lewd and sexually explicit underground newspaper on campus.[217] In so doing, the *Fridley* court applied the *Fraser* standard but expanded its application to settings beyond the classroom or school assembly.[218] Similarly, a federal district court in Massachusetts applied *Fraser* in upholding a school policy prohibiting T-shirts bearing "obscene, profane, vulgar or lewd" messages[219]

(holding that public school could bar use of Confederate flag as school symbol and use of name "Rebels" for athletic teams and extracurricular activities because of racial tension and potential disruption). Similarly, in *Melton v. Young*, the incorporation of Confederate articles at school functions had resulted in two disturbances that required police assistance. Melton v. Young, 465 F.2d 1332, 1333 (6th Cir. 1972) (holding that schools could prohibit use of Confederate flag as school flag, "Rebels" as team name, and "Dixie" as school pep song; also schools could suspend students for wearing clothing bearing Confederate flag where necessary to prevent potential danger and disruption due to racial tensions in school).

[215] Bethal Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).

[216] 822 F.2d 747 (8th Cir. 1987).

[217] *Bystrom*, 822 F.2d at 755.

[218] The court, relying on Supreme Court precedent, found that "school boards have power to prohibit the introduction onto their property by students of written material pervaded or characterized by . . . words that used to be considered unprintable." *Id.* at 753. *But see* McIntire v. Bethel Indep. Sch. Dist. No. 3, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992) (enjoining superintendent from banning T-shirts on ground they promoted alcohol. The court applied *Tinker*, found no evidence of disruption, and held that *Fraser* applies only to student speech in school-sponsored expressive activities).

[219] *See* Pyle v. South Hadley Sch. Comm., 861 F. Supp. 157, 170 (D. Mass.

even though the lewd speech at issue was not attributed to a school-sponsored event.[220]

Further, speech regulations designed to curtail offensive speech may withstand constitutional challenges more effectively if implemented to prevent discrimination or harassment under federal civil rights statutes. For example, a court may be more inclined to deem constitutional a general policy aimed at prohibiting speech contributing to a discriminatory or hostile learning environment in violation of either Title VII[221] or Title IX[222] because the policies are aimed primarily at eliminating the discriminatory impact or "secondary effects" of the speaker's message rather than the content of the speech itself.[223] Importantly, however, at least one federal court has rejected this approach.[224]

1994). The T-shirts in *Pyle* read "See Dick Drink. See Dick Drive. Don't Be A Dick." and "Coed Naked Civil Liberties: Do It To The Amendments." *Id.* at 162.

[220] *Id.* at 167-68.

[221] *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that employer's institution of anti-sexual harassment policy is affirmative defense to sexual harassment claim under Title VII).

[222] Title IX bars sexual discrimination in public schools receiving federal funds. Title IX of the Education Amendments Act of 1972 (Title IX), 20 U.S.C. § 1681 (1994). The United States Supreme Court held in *Davis v. Monroe County Board of Education* that a school district could be held liable if its employees are deliberately indifferent to complaints of peer-to-peer sexual harassment. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1673 (1999). Applying *Burlington's* rationale, a court may conclude that instituting a policy aimed at curbing sexual harassment through regulating speech is consistent with Title IX's broad directive to prevent sexual discrimination at schools and, therefore, uphold the policy as constitutional.

[223] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389, 394-95 (1992). *See also* Shaw, *supra* note 210, at 52 (arguing that "schools should be able to prohibit student conduct (including speech) that creates a hostile learning environment for another student, because the regulation would be directed at the speech's secondary effects rather than at the content of the speech").

[224] UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (stating "[s]ince Title VII is only a statute, it cannot supersede the requirements of First Amendments").

IV. ANTI-VIOLENCE MEASURES IMPLICATING THE FOURTH AMENDMENT

As with policies implicating the First Amendment, the law of search and seizure is also complicated and ever changing. School officials should consult with their legal counsel before instituting any search policy to make certain that proposed policies do not violate a student's Fourth Amendment rights against unreasonable searches and seizures.[225] States may provide individuals greater rights against searches and seizures than those afforded under the United States Constitution.[226] School officials should therefore consult with their appropriate legal advisors concerning state constitutions, statutes, regulations, and case law.[227]

A. Overview of Search and Seizure Law Within Public Schools

1. T.L.O.'s "Reasonable Suspicion" Standard

The Supreme Court has held that warrant and probable cause requirements are not applicable to searches conducted by school personnel.[228] In *New Jersey v. T.L.O.*, a teacher found a student—referred to as "T.L.O." to protect her identity—smoking cigarettes in the school bathroom in violation of a school rule.[229] When school administrators confronted T.L.O. after taking her to the vice-principal's office, T.L.O. denied that she had been smoking and claimed she was not a smoker.[230] The assistant vice-principal opened T.L.O.'s purse and found a pack of cigarettes and rolling papers he associated with marijuana use.[231] He then thoroughly searched her purse and found marijuana, a pipe, plastic bags, a large sum of money, a list of students who owed T.L.O money, and two letters that implicated her in dealing marijuana.[232] When the student was arrested on drug charges, she claimed that the evidence found in her purse should be suppressed as the fruits of an unreasonable search and seizure conducted without probable cause and without a warrant.[233]

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[225] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

[226] The Supreme Court expressly recognized this possibility when it decided *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court held that a state "may insist on a more demanding standard [of reasonableness] under its own Constitution or statutes." *T.L.O.*, 469 U.S. at 343 n.10. In such cases, however, a state court "would not purport to be applying the Fourth Amendment when [it] invalidate[s] a search." *Id.*

[227] An excellent resource regarding issues pertaining to school searches in public schools is NATIONAL ASSOCIATION OF ATTORNEYS GENERAL SCHOOL SEARCH REFERENCE GUIDE 1999 (1999).

[228] *T.L.O.*, 469 U.S. at 340-41.

The Court disagreed, determining that the substantial interest in maintaining security and order in the classroom justifies a more flexible, less stringent standard of reasonableness for searches of students conducted by school officials, as opposed to law enforcement officers.[234] When dealing with searches and seizures of students, the Court set out the necessary balancing test stating: "Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[235] However, in upholding the search of

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[229] *Id.* at 328.

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.* at 329.

[234] *Id.* at 337-43. The Court held:

> The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (citation omitted).

[235] *Id.* at 339. In striking the required balance, the Court noted "that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." Particularly, the Court asserted that requiring teachers to obtain warrants before searching students would be overly burden-

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some. *Id.* The Court then concluded:

> [T]he accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the school does not require strict adherence tot he requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all of the circumstances, of the search.

Id.

A problem, however, may arise in determining the appropriate standard to be applied when school officials work in conjunction with law enforcement officers. Specifically, the question raised when school officials work with the police when conducting searches is whether these searches may be based on a reasonable suspicion, or whether the more stringent standard of probable cause (as required for police searches) is required.

In *In re Angelia D.B.*, the Wisconsin Supreme Court held that the proper standard for "searches conducted on public school grounds by school officials, or by police working at the request of and in conjunction with school officials" is reasonable suspicion. 564 N.W.2d 682, 690 (Wis. 1997). In *D.B.*, the assistant principal notified a police officer (who was also a school liaison officer) of a report that the defendant was carrying a knife. *In re Angelica D.B.*, 564 N.W.2d at 684. The officer searched D.B. and the knife was discovered. *Id.* D.B. was charged with carrying a concealed weapon and sought to suppress the knife as evidence, arguing that the police officers lacked the probable cause necessary to conduct the search. *Id.* at 684-85.

The Wisconsin Supreme Court acknowledged the "inherent differences" between school officials and police officers which, in its opinion, "[made] the reasonable grounds standard inapplicable to searches conducted by police officers acting independently of school officials." *Id.* at 688. The court, however, distinguished the facts in this case from an independently conducted police search noting that the officer "became involved in this investigation only after school officials requested his assistance, and throughout the course of the investigation, he acted in conjunction with school officials on school grounds." *Id.* at 690. The court then concluded that the "reasonable grounds standard, and not probable cause" was sufficient for the search and, therefore, the knife, as evidence, was admissible. *Id.* at 690, 692.

Importantly, the facts in *D.B.* may be distinguished in that the police officer was a school liaison officer on duty at the school and the search was for a dangerous weapon. Thus, a different standard may apply if the law enforcement personnel involved in the search are not closely affiliated with the school or when the items sought do not pose a grave and/or immediate danger to the school staff or students.

The question of whether reasonable suspicion or probable cause applies also determines whether school officials must inform students of their legal rights when questioning them about alleged misconduct on school property. The Rhode Island Supreme Court has held that Miranda warnings are not required before school officials, who are not acting as agents of the police, question students with respect to alleged misconduct. *See In re* Harold S. 731 A.2d 265, 267-68 (R.I. 1999). *See*

T.L.O.'s purse, the Court cautioned that a search conducted by a school official must be "'justified at its inception" by a reasonable suspicion that the search will reveal evidence of a violation of law or school rules.[236] Therefore, before searching a student, a school official should be able to clearly articulate the facts giving rise to his or her suspicion that the student has violated a particular law or school rule, and the school official should be able to clearly describe the law or rule the student is suspected of violating. Furthermore, a school search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[237]

In interpreting and applying the "reasonable suspicion" standard set forth by the Supreme Court, lower courts generally have required more than general suspicion, curiosity, rumor, or a hunch to justify searches of students and their possessions.[238] The more specific the evidence in support of

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also In re D.E.M., 727 A.2d 570, 571-72 (Pa. Super. Ct. 1999) (holding that "school officials need not provide Miranda warnings to a student before questioning the student about conduct that violates the law and/or school rules").

[236] *T.L.O.*, 469 U.S. at 342.

School districts should not implement search policies based on student profile systems designed to indicate likely criminal or unauthorized activity. Individual searches may be conducted only when the school has a reasonable suspicion that the law or a school policy has been violated. A search executed pursuant to a profile system analysis, however, would not give the school a particularized reason to believe that the student has acted impermissibly and, therefore, would likely be deemed unconstitutional.

However, a profile system designed to determine which students are at risk for committing violent acts or suicide would likely be permissible because the objective of such a system is to provide troubled students with counseling or psychological treatment and would likely not be considered a search. K. DWYER, UNITED STATES DEPARTMENT OF EDUCATION, EARLY WARNING TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS 24 (Aug. 1998).

[237] *T.L.O.*, 469 U.S. at 342.

[238] *See, e.g.,* Cales v. Howell Public Schs., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (holding search by school official was illegal as search was not justified at its inception); *In re* Appeal in Pima County Juvenile Action, 733 P.2d 316, 317-18 (Ariz. Ct. App. 1987) (holding no reasonable suspicion for principal to search student since principal had no personal knowledge regarding boy's conduct and received no report creating reasonable suspicion that drugs would be found). *But see* Breeding v. Driscoll, 82. F.3d 383, 383 (11th Cir. 1996) (holding that direct tip

searching an individual student, the more likely the search will be upheld.[239]Additionally, courts are more likely to uphold searches when school officials show circumstances presenting an immediate threat of danger justifying the search[240] or when students have a reduced expectation of privacy.[241]

2. *Vernonia's "Reduced-Expectation-of-Privacy" Standard for Drug Testing of Student Athletes*

Generally, courts require school administrators to have an "individualized" or "reasonable" suspicion that a student has broken a law or a school rule before conducting a search. But in *Vernonia School District 47J v. Acton*, the Supreme Court upheld a school's policy authorizing random urinalysis drug test-

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from another student regarding plaintiff student's possession of illegal drugs provided reasonable grounds for search); J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997) (holding that information from another student regarding plaintiff student's possession of an illegal firearm provided reasonable grounds for search); People v. Pruitt, 662 N.E.2d 540, 548-50 (Ill. App. Ct. 1996) (holding that anonymous tip from another student that defendant was carrying firearm justified removing defendant from classroom and questioning him); *In re* D.E.M., 727 A.2d at 577-78 (holding that anonymous rumor that student had firearm was reasonable grounds for detaining, questioning, and searching student).

[239] *See, e.g.*, *Driscoll*, 82 F.3d at 388 (holding that information provided to school administration directly, as opposed to anonymously, was "more likely to be reliable because the student informant faced the possibility of disciplinary repercussions if the information was misleading"); *In re* Gregory M., 627 N.E.2d 500, 503 (N.Y. 1993) (hearing of unusual metallic "thud" by security officer when student's bag was flung down suggested bag contained a weapon and, therefore, search was justified).

[240] *See, e.g.*, Brousseau v. Town of Westerly, 11 F. Supp. 2d 177, 182-83 (D. R.I. 1998) (upholding warrantless "pat-down" search to which sixth-grade student and her classmates were subjected after school officials sought to locate knife that was missing from school cafeteria). In upholding the search, the *Brousseau* court recognized that the student had a legitimate expectation of privacy in the contents of her pockets and a legitimate expectation that she not be subjected to a search that included unwanted and unjustified touching of her person. *Brousseau*, 11 F. Supp. 2d at 181. However, the search as conducted was minimally intrusive and the government's interest in protecting the safety of students was urgent and compelling. *Id.* at 182. According to the court, the knife in question, over thirteen inches long with a nine-inch serrated metal blade, was capable of inflicting serious injury. *Id.*

[241] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995); Todd v. Rush County Schs., 133 F.3d 984, 986 (7th Cir. 1998).

ing of students, who participated in the school's athletics programs.[242] Though acknowledging that the state-compelled collection and testing of urine, as required by Vernonia's policy, constituted a search,[243] the Court could not rely on *T.L.O's* "reasonable-suspicion standard" to justify random drug testing that was not based on individualized suspicion.

Instead, the Court measured the Vernonia policy against the test that originally spawned the *T.L.O.* standard, balancing the search's "intrusion on the individual's Fourth Amendment interest against its promotion of a legitimate government interest."[244]

According to the Court, the intrusiveness of the search was reasonable because the expectations of privacy among students is less than that of the general public.[245] And the privacy expectations of student athletes is even less than that of the student body as a whole.[246] Moreover, student athletes, by voluntarily engaging in athletic programs, subject themselves to higher standards of regulation, according to the Court.[247]

While the intrusiveness of the search was minimal, the Court reasoned that the legitimate governmental concern was great.[248] Specifically, the Court addressed the school district's need to deter drug use in schoolchildren, the "physical, psychological, and addictive effects of drugs," the disruption of the educational process stemming from drug use, and the actual or potential increase in sports-related injuries among drug-using student athletes.[249] And, according to the school, student athletes, in particular, were leading the school's drug culture.[250]

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[242] *Veronia Sch. Dist. 47J*, 515 U.S. at 649, 665.

[243] *Id.* at 652.

[244] *Id.* at 652-53 (citation omitted). Consistent with *T.L.O.*, the Court noted that while a warrant, based on probable cause, is generally required to establish the reasonableness of a search, "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable.'" *Id.* at 653 (citation omitted).

[245] *Id.* at 657.

[246] *Id.* The Court based this finding on the fact that students athletes used non-individualized locker rooms and shower facilities so frequently that "communal undress" was almost inherent to athletic participation. *Id.* (citation omitted).

[247] *Id.* The Court analogized student athletes to individuals who chose to work in closely regulated industries and concluded that "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

The Court, in considering the character of the intrusion of obtaining the urine sample found that the intrusion was negligible because the conditions under which the sample was obtained was "nearly identical to those typically encountered in public restrooms." *Id.* at 658.

The Court balanced the unobtrusive nature of the search—manifested by the student athletes' decreased expectations of privacy—with the severity of the problem sought to be addressed—a pervasive drug problem, especially among student athletes—and upheld Vernonia's suspicionless drug-testing policy as both reasonable and constitutional.[251]

B. Metal Detectors

Currently only a small percentage of schools use metal detectors;[252] yet, more are being installed at the schoolhouse gate and at entrances of athletic and other extracurricular events.[253] Metal detectors are in some ways a "two-edged sword."[254] They are expensive and require trained personnel to operate them. Further, depending on the manner in which they are used and whether a school district can afford to install them at more than one entrance, metal detectors may affect the students' ability to enter the school in a timely manner.[255] On the other hand, they are extremely effective in detecting metal weapons, including firearms and knives, effectively precluding a student's ability to have weapons in the classroom.[256]

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[248] *Id.* at 660-61.

[249] *Id.* at 661-62.

[250] *Id.* at 649.

[251] *Id.* 664-65. Other courts, expanding *Vernonia's* scope, have upheld as constitutional the random drug testing of all students engaging in all types of extracurricular activities. *Compare* Todd v. Rush County Schs., 133 F.3d 984, 986 (7th Cir. 1998) (holding drug testing policy for all students engaged in extracurricular activities, including student-based athletics, government, and special interest clubs constitutional) *with* Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095, 1103 (Colo. 1998) (finding that member of extracurricular marching band had higher expectation of privacy than student athletes and that mandatory drug testing of the marching band was not efficacious approach to solving drug problems in the school). *See also* Willis II v. Anderson Community Sch. Corp., 158 F.3d 415, 420-21 (7th Cir. 1998) (holding that school policy that required drug testing of every student suspended for in-school fighting could not be justified as special need).

[252] In 1997, four percent of surveyed schools reported using "random metal detector checks" and one percent required students to "pass through metal detectors daily." NATIONAL CENTER FOR EDUCATION STATISTICS, UNITED STATES DEPARTMENT OF EDUCATION, PRINCIPAL/SCH. DISCIPLINARIAN SURVEY ON SCH. VIOLENCE 63 (1997).

[253] Ann L. Magestic et al., *Legal and Policy Issues in Curbing Violence in Schools, in* LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE 3 (National School

In spite of the trend toward using metal detectors, there is little case law addressing the constitutionality of general metal detector searches in public schools.[257] The available case law suggests that the use of metal detectors is legally permissible provided they are used within certain guidelines to ensure that a student's constitutional rights are not violated.[258] Like random drug testing, courts have held that random searches with metal detectors do not require individualized suspicion.

For example, the Appellate Court of Illinois considered the Chicago Public Schools' use of random metal detector searches after one of its searches resulted in the confiscation of student Serrick Pruitt's .38 caliber revolver.[259] Prior to the confiscation Pruitt passed through a metal detector operated by the school in conjunction with the Chicago Police Department.[260] When he passed through the detector, the machine registered a positive reading and a subsequent pat down by a police officer revealed the gun.[261] The court, in upholding the search, recog-

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Boards Association Council of School Attorneys ed., 1994).

[254] Christopher B. Gilbert, *How to Keep Your School Safe and Secure*, SCH. BUSINESS AFFAIRS 6 (Nov. 1996).

[255] *Id.*

[256] *Id.*

[257] Magestic et al., *supra* note 253, at 3.

[258] *See, e.g.*, Thompson v. Carthage Sch. Dist., 87 F.3d 979, 983 (8th Cir. 1996); *In Re* Latasha W., 60 Cal. App. 4th 1524, 1527 (Cal. Ct. App. 1998); People v. Pruitt, 662 N.E.2d 540, 545-47 (Ill. App. Ct. 1996); State v. Dukes, 580 NY.S.2d 850, 853 (N.Y. Crim. Ct. 1992).

[259] *Pruitt*, 662 N.E.2d at 544-47.

[260] *Id.* at 547.

[261] *Id.* In *Pruitt*, the search was conducted by a police officer who was assigned to the school as a liaison officer. The court held that as a liaison officer,

nized that school officials need only have "reasonable suspicion" to search students and did not need individualized suspicion to justify the use of metal detectors.[262] The reality of violence in the schools, combined with the limited nature of the search, satisfied the reasonable suspicion standard.[263]

In another case, *People v. Dukes*,[264] a special police unit set up "scanning posts" at the entrance of a Manhattan, New York, high school.[265] Under guidelines adopted by the State, officers using hand-held metal detectors could search all students entering the school or limit the search by random formula, for example, by searching every fourth student.[266] On the day of the search, school officials posted signs outside the school building, notifying students of the weapons search.[267]

Dukes, a student, had her bag searched by a special police officer using a hand-held device.[268] After the scan indicated the presence of metal in her bag, police searched the bag further and found a switchblade knife.[269] Dukes was charged with a misdemeanor and attempted to have the knife suppressed, contending the search was unconstitutional.[270] The judge, however, found that the search was minimally intrusive

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the police officer was "in the same position as a school official for Fourth Amendment purposes." *Id.* at 544.

[262] *Id.* at 547.

[263] *Id.*

[264] 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992).

[265] *Dukes*, 580 N.Y.S.2d at 850.

[266] *Id.* at 850-51.

[267] *Id.* at 850.

[268] *Id.* at 851.

[269] *Id.*

[270] *Id.*

and, therefore, admitted the knife.[271]

Whether a school district negligently endangers its students by using metal detectors on a random basis has also been a source of litigation.[272] Courts have generally held "that the random use of metal detectors does not facilitate violence on the days when the detectors are not in use"[273]; however, the part-time use of metal detectors does limit their effectiveness.[274]

These cases emphasize a school district's need for a carefully articulated policy regarding the use of metal detectors. The following guidelines have been suggested[275]:

- "If possible, install the detectors permanently and use them on a regular basis."[276] The less discretion school officials have in deciding when metal detectors should be used, the less likely the search will be used to target a particular person or group.[277]
- If the detectors are to be used on a random or sporadic basis, draft written procedures and guidelines detailing when a school administrator may use the detectors.[278]
- "Have all students pass through the detectors; this prevents any claim that specific students or groups have been singled out for harassment."[279]

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[271] *Id.* at 852-53. The court held that the search involved in *Dukes* was minimally intrusive because

> the officers [were] required to terminate the search at various junctures upon finding the metal which activated the scanning device. The officers [were] not permitted to begin the pat-down search until the scanning device ha[d] been activated twice. Even then, the officers [had to] start the pat-down search in the precise area where the scanning device was activated.

Id. at 853.

[272] Gilbert, *supra* note 254, at 6-8.

[273] *Id.* at 8.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

- If administrators do not intend to check all of the students entering a building, they should use a nondiscriminatory method for selecting the students to be searched (e.g. every fifth student).[280] Selecting students non-systematically will probably be found unconstitutional unless there is reasonable suspicion for selecting each student.[281]
- If school administrators anticipate conducting pat-down searches when the metal detector detects metal, both male and female administrators or officers should be present to perform the pat-downs.[282] School officials can reduce the intrusiveness of searches by having administrators perform the pat-down searches who are the same gender as the students.
- "Post notices that weapons are not permitted on campus and that students and visitors may be required to submit to search by a metal detector."[283] Include such information in the student code of conduct, and have administrators send the code home to parents.[284]

C. *Security Cameras*

Security cameras offer another source of deterrence, but they are expensive and their scope of surveillance is limited to the camera's eye.[285] Another disadvantage of security cameras is that they are easily identified, and students can readily move their illicit activities to unmonitored areas within the school.[286] Any effort to conceal the surveillance equipment, however, may reduce its value as a deterrent.[287]

The use of security cameras need not be limited to the school building or the immediately surrounding campus. Some school districts have begun placing surveillance cameras on school buses to document or discourage disruptive behavior.[288] This equipment, like security cameras in general, is costly, and a school district may not be able to afford to monitor every bus in its fleet. This problem can be remedied by installing a permanent housing box for the equipment in each bus and then moving the actual equipment among the buses so that students do not know if, or when, they are being monitored.[289]

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[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*

In order to determine whether the use of security cameras is constitutionally permissible, a school district and its local counsel should apply basic Fourth Amendment principles.[290] Specifically, in implementing a surveillance policy, the school district needs to determine whether the "student has a reasonable expectation of privacy in the area" in which the camera or other monitoring device is to be installed.[291] For example, courts would probably allow cameras in a school's public areas such as hallways, classrooms, cafeterias, and buses; the use of this equipment in bathrooms, locker rooms, or other areas, however, where "students may reasonably expect a modicum of privacy" would likely be considered unconstitutional.[292] A school district can also take steps to limit a students' privacy expectations by informing students in a written student conduct policy and by posting signs in the monitored areas that students should assume that they are being watched.[293]

D. Strip Searches and Body Searches

School officials should be extremely cautious in conducting strip searches because they are considered an extreme invasion of privacy.[294] These privacy invasions may, however, be deemed constitutionally reasonable in limited circumstances. For example, the Seventh Circuit upheld a strip search of a male high school student who school administrators suspected was carrying illegal drugs in his crotch area.[295] The search was conducted by two male school officials in the boy's locker room which was otherwise empty and which was locked to ensure the student's privacy.[296] The officials maintained a ten to twelve feet distance from the student when he was instructed to remove his clothes.[297] The officials then "visually inspected the student's naked body and physically inspected his clothes."[298] In light of the officials' reasonable grounds for suspecting that the search would turn up evidence and the precautions officials took to safeguard the student's privacy, the court found the search to have been "justified at its inception"[299] and "permissible in scope."[300]

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[288] Magestic et al., *supra* note 253, at 7.

[289] *Id.*

[290] *Id.*

[291] Gilbert, *supra* note 254, at 9.

[292] Magestic et al., *supra* note 253, at 7. *See* Gilbert, *supra* note 254, at 9.

[293] Gilbert, *supra* note 254, at 9.

[294] School administrators should discuss conducting strip searches on school grounds with their legal counsel because state statutes may expressly prohibit strip searches and because strip searches can easily expose the district and dis-

Though a school official may reasonably search a student without infringing on the student's Fourth Amendment rights,[301] "the authority of [a] school official [does] not justify a degrading body cavity search of a youth in order to determine whether a student [is] in possession of contraband in violation of school rules."[302] Because "the Fourth Amendment and privacy interests of the youth . . . clearly outweigh any interest in

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trict officials to liability.

[295] Cornfield v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316, 1319 (7th Cir. 1993).

[296] *Cornfield*, 991 F.2d at 1319.

[297] *Id.*

[298] *Id.*

[299] *Id.* at 1320. The court stated that "a search of a student . . . is 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.*

[300] *Id.* The court stated that "[t]he measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

[301] Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984) In *Tarter*, the court held that student searches were permissible "if the school official has reasonable cause to believe the search is necessary in the furtherance of maintaining school discipline and order, or [is within] his duty to maintain a safe environment conducive to education." *Tarter*, 742 F.2d at 982.

[302] *Id.*

school discipline or order [that] might be served by such a search,"[303] body cavity searches should never be conducted by school personnel.

3. *Searches by Drug-Sniffing Dogs*

Many school districts are now using trained dogs to find drugs, explosives, and other items of contraband within the schools.[304] Dogs, however, are not as capable as metal detectors in alerting school officials to the presence of metal weapons or firearms.[305] "In addition, reliability varies from dog to dog," possibly providing an opportunity for a challenge to the validity of the search.[306]

The Supreme Court has not ruled on the constitutional permissibility of searches by drug-sniffing dogs in public schools. However, one federal appeals court has determined that the use of drug dogs to conduct suspicionless searches of students is legally permissible, while two other federal courts of appeals reached contrary positions, holding that the use of drug dogs to conduct suspicionless student searches is unconstitutional.[307]

In *Doe v. Renfrow*, the Court of Appeals for the Seventh Circuit upheld a school district's use of trained dogs that went up and down the rows of over 2,500 junior and senior high school students, sniffing for drugs.[308] If a dog indicated a particular student possessed drugs, that student was searched.[309] One student, who was strip searched by school administrators after the dog reacted positively to her, challenged the search, claiming it violated the Fourth Amendment.[310] The Seventh

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[303] *Id.* at 982-83.

[304] Gilbert, *supra* note 254, at 8.

[305] *Id.*

[306] *Id.*

[307] *Compare* Doe v. Renfrow, 631 F.2d 91, 92 (7th Cir. 1980) *with* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 481-82 (5th Cir. 1982) and B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1268 (9th Cir. 1999).

[308] *Doe*, 631 F.2d at 91-92.

[309] *Renfrow*, 475 F. Supp. 1017.

[310] *Renfrow*, 475 F. Supp. at 1018.

Circuit disagreed, finding the dogs' sniffing did not constitute a search.[311] The court found the school administrators could be liable, however, for strip searching the student because, pursuant to *T.L.O.*, the strip search had been impermissibly intrusive in scope.[312]

Notwithstanding the Seventh Circuit's approval of suspicionless or non-individualized searches by drug dogs, the apparent trend in courts is to require that sniff searches by dogs be conducted pursuant to reasonable or individualized suspicion or to be limited to inanimate objects.[313]

In *Horton v. Goose Creek Independent School District*, the Fifth Circuit Court of Appeals explicitly rejected the rationale of *Renfrow*.[314] Absent individualized suspicion, a school district's desire to prevent students' drug or alcohol use is insufficient to conduct a sniff search of a particular individual.[315] In rejecting suspicionless searches of students by drug dogs, the court distinguished dog sniffing of individual students from dog sniffing of inanimate objects such as cars and lockers.[316] Sniffing cars or lockers is not a "search" because—unlike the area immediately surrounding a student's body—there is generally no reasonable expectation of privacy in the air surrounding an inanimate object in a public place, such as a student's locker.[317] Therefore, according to the Fifth Circuit, a sniff of one's person by a drug dog constitutes a search under the Fourth Amendment, requiring individualized suspicion.[318]

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[311] *Doe*, 631 F.2d at 92; *see Renfrow*, 475 F. Supp. at 1022.

[312] *Doe*, 631 F.2d at 92. In fact, the court found the search so unreasonable that school administrators could not enjoy immunity. *Id.*

[313] *See, e.g.,* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 470 (5th Cir. 1982).

[314] *Horton*, 690 F.2d at 475.

[315] *Id.* at 481-82.

[316] *Id.* at 476-77.

[317] *Id.*; *see also* United States v. Place, 462 U.S. 696, 707 (1983) (holding drug dog sniffing luggage in airport does not constitute "search"); Zamora v. Pomery, 639 F.2d 662, 670 (10th Cir. 1981) (holding drug dogs can generally sniff exterior of student lockers without violating Fourth Amendment); United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972) (finding metal detector search in airport terminals to detect concealed weapons was "search" under Fourth Amendment). *See also* Gilbert, *supra* note 254, at 8.

More recently, the Court of Appeals for the Ninth Circuit held that a California school district's use of a drug-sniffing dog for suspicionless searches of students was unreasonable under the Fourth Amendment.[319] In *Plumas v. Plumas Unified School District*, the students were told by the school administration to exit their classroom, which required passing a drug-sniffing dog positioned outside the classroom door.[320] The students then were instructed to wait outside the classroom while the dog sniffed backpacks, jackets, and other belongings that students left in the room.[321] One student, called "B.C." by the court, claimed the school district, in authorizing the drug sniffing of the students, "conducted an unreasonable search of his person."[322]

The Ninth Circuit agreed. Relying on the Fifth Circuit's holding in *Goose Creek* and rejecting the Seventh Circuit's holding in *Renfrow,* the court concluded that the "close proximity" required for dog sniffing was offensive, infringing B.C.'s reasonable expectations of privacy.[323] Additionally, the court found that this infringement was not justified by the school's interest because, even though deterring student drug use is a "compelling governmental interest," the school district failed to establish that a drug problem existed in the schools where students were searched.[324] The court therefore concluded that, under the circumstances, the suspicionless dog sniff search was unreasonable.[325]

Because the apparent trend is for courts to recognize a dog's sniffing of a student as a "search" under the Fourth Amendment, school administrators should have a "reasonable suspicion" that the individual student to be searched has broken a law or a school rule before a sniff search by a dog is conducted.

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[318] *Horton,* 690 F.2d at 479.

[319] B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1268 (9th Cir. 1999).

[320] *B.C.*, 192 F.3d at 1263.

[321] *Id.*

[322] *Id.* at 1264.

[323] *Id.* at 1266. The court also found that the dog sniffing of individuals was a "search." *Id.*

[324] *Id.* at 1268.

[325] *Id.*

V. DEVELOPING POLICIES TO PREVENT SCHOOL VIOLENCE

A. *Organizing the School Violence Prevention and Response Team*

Many districts are reducing crime and violence—and reducing potential liability[326]—by forming committees charged with assessing threats of school violence, identifying resources, and formulating effective responses.[327] Violence-prevention plans are most effective when designed by a diverse group of people from both the school and the surrounding community.[328] Administrators, teachers, students, security personnel, counselors, and at least one member of the school board should be represented on the team, as well as parents, law-enforcement officers, health-related service practitioners, and other area residents.[329] Although the team should include as many voices as practicable, the key partners are the senior official of each school and the senior law-enforcement official of the area of jurisdiction in which the school is located.[330]

Because most policies cannot be enacted unilaterally by the violence-prevention team involving policymakers[331] early in the process increases the likelihood that the adopted policies and procedures will be endorsed and supported by the community.[332] Gaining the support of school board members and local government officials before violence prevention plans are effectuated is critical.[333] These recognized policymakers may serve as valuable school-district allies when students or their parents question whether the plans are appropriate.[334]

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[326] *See* Lisa L. Swem, *Preventing Threats of Violence in Schools from Turning into a Tragedy, in* SCHOOL LAW IN REVIEW 1-8 (1999) (developing policies to prevent school violence can be significant component for liability reduction).

[327] *See* UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10. Seventy-eight percent of schools report having some type of formal violence prevention program or effort. NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 12, at 23.

[328] DWYER, UNITED STATES DEPARTMENT OF EDUCATION, *supra* note 236, at 24. The author states that "[p]articipation from families, faith communities, businesses, health and social service agencies, police, juvenile justice authorities, and civic organizations is necessary to successfully intervene and prevent school violence." *Id.*

[329] STEPHANIE KADEL & JOSEPH FOLLMAN, REDUCING SCHOOL VIOLENCE 3 (Mar. 1993).

[330] National Crime Prevention Counsel, *Safer Schools: Strategies for Educators and Law Enforcement to Prevent Violence, Working Together* (last visited Feb. 28, 2000) <http://www.ncpc.org/eduleo2.htm>.

In addition to established policymakers, students, because they have first-hand knowledge of the strengths and weakness of school policies and procedures, may provide unique insight into the manner in which policies can be made more effective.[335] Further, when students participate in the decision-making process, they are more likely to support and adhere to decisions that are made.[336] Thus, student involvement in school violence-prevention programs should be encouraged, and school officials should seriously consider and incorporate student-suggested resolutions when practicable. If students and parents are actively involved in formulating the plans, they may be less likely to challenge them.

B. *Assessing the Threat of School Violence*

A thorough understanding of the problems, and the tools available to solve the problems, is essential before developing an effective violence-prevention plan. The team should conduct a safety assessment of the school by reviewing

- current security and safety policies;

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[331] *Id.* Policymakers critical to the implementation of violence-prevention plans include school boards and local governing bodies. *Id.* Additionally, because law-enforcement agencies must abide by state and local laws and school principals must follow school-board decisions and directives from the school district's superintendent, ensuring that violence-prevention plans are consistent with local laws and directives increases their likelihood of successful implementation. *Id.*

[332] *Id.*

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

- the school's floor plan showing boundaries and access points;
- school crime reports;
- "[k]nown safety concerns of staff [and] students";
- a log of all calls to police relating to violence;
- existing student and teacher handbooks;
- media articles relating to violence in the school; and
- disciplinary files, including an assessment of whether the files indicate a trend toward more violent behavior with respect to both individual students and the overall student population.[337]

This information will give the team a strong sense of what the school is doing successfully, what the school has tried unsuccessfully, and what improvements are needed. Equally important, the assessment should include a review of what violence-prevention resources are available from the school and the greater community.[338]

C. Developing the Violence-Prevention Plan

1. General Considerations

Once the team has assessed the current state of school safety and identified available resources, the next step is for the team to develop a plan. A sound violence prevention plan details the manner in which school and community resources can be utilized to create safe environments by making physical or technological improvements and instituting policies with both immediate and long-term impact.

The plan should create a balance between policies that will have an immediate impact and those designed to address long-term goals of positively changing the social environment of the school community. For example, the plan might utilize technologies promoting crime prevention, as well as curricular activities teaching students how to manage anger effectively and to settle arguments peaceably.[339]

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[337] RONALD D. STEPHENS, NATIONAL SCHOOL SAFETY CENTER, COPING WITH SCHOOL VIOLENCE: HOW TO TURN SCHOOLS INTO SAFE HAVENS FOR CHILDREN 13 (1998).

[338] For example, the team should determine, as part of its general assessment, whether guidance counselors are trained and available for troubled students and whether community programs are available that may be utilized to expand student awareness of approaches to violence prevention.

Importantly, every goal should be realistic and reasonably specific. A violence-prevention plan with an unrealistic goal may be unattainable, increasing the likelihood of failure and inviting criticism.[340] Realistic goals, however, can illicit a greater commitment from the students, staff, and community.[341] Additionally, the goals and objectives of a violence prevention plan may need to be altered as preliminary objectives are achieved, changes in the educational system occur, or as new law is enacted.[342] Preparing a comprehensive school-safety plan is a complex process that does not end with development and implementation. It requires ongoing cooperation and constant evaluation of the effectiveness of the strategy.[343]

2. *Anticipating and Avoiding Legal Challenges*

Approaches to creating safer schools have legal consequences that should be discussed with local counsel before any violence-prevention plan is implemented. One often-forgotten expense in improving school safety is the cost of defending new safety measures against potential lawsuits challenging their legality usually, on constitutional grounds.[344] Therefore, in evaluating new safety measures, schools should consider both the actual costs of implementing plans and procedures, as well as the possibility of a costly legal battle that may conclude with the court finding unlawful the challenged policies.

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[339] For a listing of available model programs, see UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[340] *Id.*

[341] *Id.*

[342] *See* Daniel J. Flannery, *Improving School Violence Prevention Programs Through Meaningful Evaluation, in* CLEARINGHOUSE ON URBAN EDUC. 1 (June 24, 1998) <http://www.eric-web.tc.columbia.edu/digests/dig132.html> (stating that "[a]ssessment must continue as the program operates so that changes can be made to account for new developments and to improve outcomes. Such evaluation data can then be used to support requests for funding the program's continuation").

[343] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[344] *See* Landra Ewing, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence,* 36 J. FAM. L. 627, 630-39 (1997) (discussing legal challenges to school districts' safety policies or lack of safety policies).

School districts, however, also need to address the potential costs of not acting. In evaluating the potential litigation expense of using, or failing to use, particular anti-violence tools, school districts are often placed in a difficult position.[345] Parents and students, for example, have sued school districts that use metal detectors for infringing privacy rights of students.[346] School districts have also been sued for *not* using metal detectors on the theory that the school knew of the potential danger of guns and knives on school property but failed to use metal detectors to provide a safe atmosphere.[347] This dilemma underscores the need for active involvement of legal counsel in formulating violence prevention plans.

3. *Physical Improvements To Curb School Violence*

A school's physical attributes may influence whether crime and violence will occur on its premises.[348] To reduce the risk of violence in schools buildings should be designed "to limit access of unauthorized persons, increase the ability of school staff to visually supervise all areas of the school facility and reduce crowding."[349]

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[345] Gilbert, *supra* note 254, at 5, 9.

[346] People v. Dukes, 580 N.Y.S.2d 850, 850-51 (N.Y. Crim. Ct. 1992).

[347] *See* Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 199, 202 (5th Cir. 1994) (holding school, which owned metal detectors but kept in storage, not negligent because school had not used metal detectors). In *Genao v. Board of Education*, a teacher sued the district after being assaulted in her classroom by several non-students who had entered the school. 888 F. Supp. 501, 503-04 (S.D.N.Y. 1995). The teacher argued the right to discovery regarding security procedures, including metal detector use. *Genao*, 888 F. Supp. at 503-04. *But see* Paul M. Bogos, Note, *"Expelled. No Excuses. No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. L. REV. 357, 368 & nn. 76, 77 (1997) (stating that "[a]ccordingly, when confronted by a foreseeable dangerous condition, school authorities and teachers must take affirmative action or risk being held liable for their failure to act").

[348] Research suggests that incidents of fighting and violence are exacerbated "in school buildings that are dirty, too cold or too hot, filled with graffiti, in need of repair, or unsanitary." DWYER, *supra* note 236, at 20.

Additionally, existing school buildings may be altered to increase school safety. The Department of Education suggests that schools install adequate lighting, break-proof doors, and window locks; minimize the availability of private storage areas such as student lockers; and eliminate removable ceiling panels.[350]

4. Empowering Teachers, Students, Parents, and the Community Through Anti-Violence Education and Programs

Schools may have to go beyond physical improvements[351] or the use of technological devises to promote school safety. In formulating a violence-prevention strategy, schools should consider implementing programs designed to inure teachers, students, and their parents with emotional and psychological-based solutions that proactively address school violence.

a. Teacher Training

Teacher training that focuses on violence prevention can create safer schools as well as increase feelings of security among staff members.[352] Teachers should be offered programs aimed at developing their ability to identify at-risk students, identifying and diffusing potential violent situations, and dealing safely with incidents of actual violence.[353] By training teachers to manage and resolve conflicts, potentially hostile situations can be de-escalated and aggression and violence reduced.[354] The United States Department of Education suggests that teachers receive additional instruction in the following areas:

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[349] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[350] *Id.*

[351] The Department of Education suggests the following changes to school buildings to decrease crime and violence: (1) limit access of unauthorized persons, (2) install adequate lighting, (3) install break-proof doors and window locks, (4) minimize the availability of private storage areas such as student lockers, and (5) eliminate removable ceiling panels. *Id.*

[352] Wendy Schwartz, *An Overview of Strategies to Reduce School Violence, in* CLEARINGHOUSE ON URBAN EDUC. (Oct. 1996) <http://www.eric-web.tc.columbia.edu/digests/dig115.html>.

[353] *Id.* For example, some parents claim school officials ignored how certain cliques at Columbine High School hassled less popular students like Harris and Klebold. Weller, *supra* note 24.

- learning to break up fights with minimal risk to themselves and other students,
- effectively and safely handling situations involving weapons,
- managing their anger and teaching anger-management skills to students,
- learning the warning signs of troubled students and knowing to whom these students should be referred in the community for help,[355] and
- talking with students about activities causing suspicion or concern and reporting such activity properly.[356]

b. Student Education and Co-Curricular Groups

To be successful violence prevention programs require student involvement: "Fifty percent of public schools with violence-prevention programs indicated that all or almost all of their students participate in these programs."[357] Student involvement is critical because students, better than anyone else, know what is occurring in the school.[358]

Students, however, may not want to get involved because they either "believe that upholding the code of silence and protecting their peers is the right thing to do" or they "may be afraid that the students they report will find out and retaliate."[359] The safety team should, therefore, encourage students to talk "to school officials about gaps in security—places where weapons are hidden, drugs are sold, fights occur, and students are threatened—and suggest ways for students to report crimes without fear of retaliation."[360]

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[354] RONALD D. STEPHENS, DEVELOPING STRATEGIES FOR A SAFE SCHOOL CLIMATE 16-17 (1998).

[355] *Id.* For an in-depth discussion on recognizing the early warning signs of at-risk children and developing intervention programs, see DWYER, *supra* note 236, at 6-12.

[356] NATIONAL CRIME PREVENTION COUNCIL, STOPPING SCHOOL VIOLENCE: 12 THINGS TEACHERS CAN DO (last visited Feb. 28, 2000) <http://www.ncpc.org/12schvio3.htm>.

[357] NATIONAL CENTER FOR EDUCATIONAL STATISTICS, *supra* note 12, at vii.

[358] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

Research suggests that "[s]tudents can directly reduce school crime by becoming peer counselors or mediators, learning conflict resolution and problem-solving, . . . tutoring or mentoring younger students, and starting a teen court."[361] The National Crime Prevention Council suggests that students

- report students who exhibit suspicious behavior, weapons, or illegal drugs in the school or at school-sponsored events;
- report the occurrence of any crime immediately;
- learn how to manage their anger effectively and teach other students anger management skills; and
- help other students settle disputes peaceably.[362]

c. *Involving Parents and the Community in Anti-violence Initiatives*

As powerful as teachers and students are as catalysts for preventing violence in schools, they cannot stem the tide of violence alone. Parents and others from the community must get involved. The effectiveness of school violence prevention programs can be improved by parental and public policies that reinforce the school's anti-violence message and by community programs that seek to prevent or ameliorate youth violence.[363]

Parents need to actively communicate with their children: "Talking with children shows that they are cared about; gives them an opportunity to share their concerns, interests, fears, and activities, and provides ideas about aspects of their school and personal lives that can be improved."[364] Parents, by talking with their children, also create opportunities to develop their children's social and problem-solving skills, as well as anger management and methods by which they might avoid victimization.[365]

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[359] *Id.*

[360] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[361] *Id.*

[362] For a complete listing, see NATIONAL CRIME PREVENTION COUNCIL, *supra* note 356.

[363] Schwartz, *supra* note 352, at 1-2.

Parents must be clear and consistent disciplinarians. Establishing rules for behavior that the child understands, explaining the justifications for the rules, and providing appropriate and consistent punishment when the rules are broken will help children understand and respect both household rules and school-discipline policies.[366] Parents should also inform their children that the school-discipline policies are as important as household rules and should support reasonable punishments administered by the school when school policies are violated.[367]

Involvement of parents in school organizations and community activities is equally important in curbing school violence. This involvement provides parents with an opportunity to better understand and address their child's needs as well as to become acquainted with his or her teachers and child-care providers.[368] Additionally, to promote good in-school behavior and enhance learning, parents should

- ensure that children attend classes and complete assigned homework,
- encourage participation in extracurricular activities,
- contact school officials if their children voice concerns about school safety,
- attend parent-teacher conferences or school board and parent/teacher association meetings, and
- know and discuss the school's discipline policies with their children.[369]

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[364] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[365] *Id.*

[366] *Id.* Offering rewards and incentives for good behavior may also be helpful in preventing future rule violations and encouraging constructive behavior. *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.* at 1-3. *See also* NATIONAL CRIME PREVENTION COUNCIL, *supra* note 356.

Finally, to decrease aggression and school violence, parents should store firearms and other weapons in securely locked areas; limit their child's exposure to violence and crime by monitoring television programs, movie viewing, video games, and internet use; and participate in family-management training, if they decide they need additional help.[370]

Community-based intervention is also a factor in preventing school violence. Some community programs focus on "breaking family cycles of violence" in an attempt to halt the permeating effect of violence in the schools.[371] These programs involve the collaborative efforts of religious and recreational organizations; social service, public housing and health agencies; the business community; the schools; and law enforcement agencies. For example, programs in parenting skills and family relationships, particularly those focusing on nonviolent living skills and recovery from substance abuse, can protect children from learning violence at home."[372]

After-school programs also benefit children because they provide adult supervision and role model exposure when parents are unavailable.[373] These programs also limit a child's exposure to negative influences—television violence and street-corner activities—while providing assistance with homework

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Parents also need to understand that, while the theories of parental liability may be novel, parents may nevertheless be sued for the acts of their children committed on school grounds. For example, (1) parents of Isaiah Shoels, killed at Columbine High School, have sued the parents of Eric Harris and Dylan Klebold alleging the parents should have prevented their sons' rampage (the Shoels seek $250 million in damages); (2) a mother of one of Luke Woodham's victims has filed suit against Woodham's father; (3) parents of three victims in West Paducah, Kentucky have filed suit against Mitchell Corneal's parents; and (4) the parents of Andrew Golden and Mitchell Johnson have been sued by the families of students who died in Jonesboro, Arkansas. *See supra* notes 1-6. For a general discussion, see Lisa Belkin, *Parents Blaming Parents, in* THE NEW YORK TIMES MAGAZINE (Oct. 31, 1999) <http:www.nytimes.com/library/magazine/home/1999103/mag-columbine-parents.html>.

[370] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[371] Schwartz, *supra* note 352.

[372] *Id.*

[373] *Id.*

and value-developing activities.[374] Keeping children constructively engaged in after-school programs can reinforce the school's violence-prevention policies and programs.[375]

Every member of the community can contribute to violence-prevention programs. For example, law-enforcement officers can patrol school grounds and travel routes, responding promptly to incidents of criminal activities in schools, consult with parents and school officials regarding security issues, and work directly with students and schools to maintain constructive relationships.[376] Elected officials and government agencies can support funding for school crime-prevention research and provide leadership by

- introducing or supporting legislation promoting school safety,
- holding town meetings to raise awareness of school crime issues,
- attending school and community events aimed at violence prevention,
- educating the public about crime and violence prevention through speeches and press releases, and
- endorsing official reports and initiatives on school crime and violence.[377]

Local businesses can offer resources to schools; provide training in basic job skills, internships, and employment opportunities; and fund scholarships for deserving students.[378] Finally, other members of the community can contribute to violence prevention by supporting measures to fund and implement anti-violence policies, volunteering at youth-group activities, and offering their professional skills in educating students, teachers, and community members regarding the effects of school violence.[379]

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[374] *Id.*

[375] *Id.*

[376] UNITED STATES DEPARTMENT OF EDUCATION & UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 10.

[377] *Id.*

[378] *Id.*

[379] NATIONAL CRIME PREVENTION COUNCIL, *supra* note 356.

VI. CRISIS MANAGEMENT AND RESPONSE

While working hard to prevent school violence, schools must also be prepared to respond effectively to violence whenever it does occur. Every school needs a "crisis-management plan that involves school personnel, students, parents, law enforcement officials, community emergency services, and the media."[380] Therefore, to be fully prepared the team designated to create the school's violence-prevention plan should also establish effective, workable crisis-management and response policies.

A. Designing and Implementing the Crisis-Management and Response Team

A school's crisis-management plan should have both management and response components designed to facilitate intervention during the actual crisis; ensure the safety of school personnel and students; and coordinate the response of law enforcement officers, disaster-relief workers, counselors, and the media in the aftermath of a tragedy.[381] Well planned crisis intervention is necessary not only to respond to school violence, but to natural disasters, as well: "Planning for such contingencies reduces chaos and trauma and, from a legal perspective, might show the school district's good-faith effort to adequately provide for the welfare and safety of its students."[382]

An effective crisis management plan includes

- evacuation procedures identifying safe areas to which students and staff should go in a crisis;
- "[a]n effective, foolproof communication system . . . [i]ndividuals must have designated roles and responsibilities to prevent confusion"[383];
- "[a] process for securing immediate external support from law enforcement officials and other relevant com-

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[380] Ronald D. Stephens, *Ten Steps to Safer Schools: Security for Students and Staff Begins with Planning*, AM. SCH. BD. J. 32 (Mar. 1998).

[381] DWYER, *supra* note 236, at 27-28.

[382] *Id.* at 28.

[383] *Id.*

munity agencies"[384];

- provisions for in-service training for all faculty and staff to learn their duties and practice responding to the imminent warning signs of violence[385]; and
- communication policies to be used with the media, parents, and students.[386]

One important thing to realize is that "[t]he procedure followed in the first thirty minutes of a crisis is crucial in establishing how people perceive the crisis and their attitude about how it was handled."[387] To minimize confusion in a crisis situation one person, the principal or a district-level administrator for example, should be designated as the official spokesperson for the school.[388] A brief official statement regarding the crisis and the actions taken should be written and disseminated to the media, as well as to teachers, students, and parents.[389] If a news conference is scheduled, a room should be designated for the conference, and reporters should be taken there immediately upon their arrival.[390] The official spokesperson should be courteous, avoid speculation, and provide enough information to answer basic questions without revealing names of students or employees involved in the incident.[391] Finally, the spokesperson should provide the public with regular updates.[392]

In the aftermath of a tragedy, the school should recognize that a community response is needed to help teachers and students deal with their reactions to the crisis and their re-entry to the school environment.[393] This is particularly important as "[i]nsensitive and unsympathetic reactions by administrators . . . can compound the emotional trauma of the attack and lengthen the recovery process."[394] To resume normal functioning after a crisis medical and psychological services need to be made available to the actual victims of the school violence and to other students, faculty, and staff.[395]

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[384] *Id.*

[385] *Id.*

[386] For a detailed explanation regarding the appropriate manner in which to communicate with the media, see Kadel & Follman, *supra* note 329, at 7.

[387] Washington State School Director's Association, *Communicating about School Safety* (last visited Feb. 28, 2000) <http://www.keepschoolssafe.org/wssd.htm>.

[388] Kadel & Follman, *supra* note 329, at 7.

[389] *Id.*

[390] *Id.*

[391] *Id.*

[392] *Id.*

Therefore, a crisis management plan should also

- "[i]dentify mental-health professionals who can be called during and after the crisis to work with students, parents, and school staff"[396];
- "[e]stablish a team of professionals who can be convened and sent to any school in the district to help with crisis recovery"[397]; and
- provide for both temporary and ongoing counseling and information.[398]

CONCLUSION

Students often allege their school's safety policies compromise their constitutional guarantees. Measures promoting school safety can, therefore, generate considerable litigation. Yet, school districts that do not enact safety measures expose themselves to the risk of litigation as students injured on school grounds increasingly look to schools as the ensurers of their safety. When school officials have a clear understanding of the unique safety challenges confronting their schools and an understanding of the constitutional rights of their students, they can work to craft realistic safety plans that create safe and orderly learning environments while respecting the constitutional rights of their students.

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[393] DWYER, *supra* note 236, at 30.

[394] Kadel & Follman, *supra* note 329, at 7. (citation omitted).

[395] *Id.* at 8. These services, should also be available to witnesses of the violent act, parents, friends, and spouses. *Id.* In addition to helping the victims of a tragedy, these services may assist in preventing angry students from retaliating and causing further violence. *Id.*

[396] *Id.*

[397] *Id.*

[398] *Id.*

AN ESSAY REGARDING *GASPERINI V. CENTER FOR HUMANITIES, INC.* AND THE DEMISE OF THE UNIFORM APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE

Michael A. Berch[*]

Rebecca White Berch[**]

I. INTRODUCTION

Ever since the passage of the Rules of Decision Act[1] in the formative years of the United States, the federal judiciary has grappled with the intriguing and elusive question of when a federal court will apply state law or rule to resolve an issue before it.[2] As every first-year law student soon discovers, the landmark case of *Erie v. Tompkins*[3] broke ranks with a long and uniform line of cases formulating rules of general federal common law for deciding cases brought in the federal courts solely on the basis of diversity. These students might not appreciate Judge Friendly's observation that *Erie* was "so beautifully simple, and so simply beautiful,"[4] for the sixty-plus years since the decision have witnessed misunderstanding and misapplication of this "simple" rule. Indeed, the task facing the judiciary has been daunting. The Supreme Court has expended extraordinary efforts to resolve the intractable problems in ways that not only comport with separation of powers and federalism principles, but also can be understood and applied by practitioners.[5] But even as one issue is decided, others are spawned that cast doubt on the soundness of the earlier resolution.[6] In this area of the law, confusion reigns and the pendulum swings widely from the presumptive application of state law to a presumption in favor of the application of federal law. In *Gasperini v. Center for Humanities, Inc.*,[7] the Court noted the "challenging endeavor"[8] of clarifying this area of the law, but in attempting to do so, merely confounded the problem.

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[1] Section 34 of the Federal Judiciary Act of September 24, 1789. The modern version of the Act reads as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1948).

[2] For an excellent discussion of the pre-*Erie* precedents and the power of the federal courts to define primary legal obligations, see HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 679-87 (4th ed. 1996).

[3] 304 U.S. 64 (1938).

II. PRECEDENTS

A brief overview of Supreme Court precedents may focus the issues,[9] explain the problem, and put into perspective why *Gasperini* makes matters worse, not better. In overruling *Swift v. Tyson*,[10] the Supreme Court in *Erie* decided that state law, not some "brooding omnipresence in the sky,"[11] as it termed the federal common law, would determine the liability of the railroad to the injured Tompkins.[12] Expressly basing its decision on constitutional grounds, the Court held that federal courts do not have the power to create general federal common law.[13] Although the Court never cited the particular constitutional provisions upon which the decision rests, the language and tenor of the opinion implicate equal protection and federalism concerns.[14] Furthermore, although *Erie* did not expressly posit the substance/procedure dichotomy,[15] later cases forged the notion that when federal courts sit in a diversity capacity, matters of substance are governed by state law and matters of procedure, by federal law.[16]

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[4] Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964).

[5] *See* Hanna v. Plumer, 380 U.S. 460, 468-69 (1965) (applying modified outcome determinative test); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (applying outcome determinative test).

[6] *See* Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 537-38 (1958) (refining *Guaranty Trust* outcome determinative test by analyzing affirmative countervailing considerations).

[7] 518 U.S. 415 (1996).

[8] *Gasperini*, 518 U.S. at 427.

[9] For a survey of the major pre-*Gasperini* opinions, see Allan Ides, *The Supreme Court and the Law to be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 19-88 (1995).

[10] 41 U.S. 1 (1842).

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[11] Southern Pac. Gas v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[12] Erie v. Tompkins, 304 U.S. 64, 77-78 (1938).

[13] *Erie*, 304 U.S. at 77-78. Several scholars believe that the constitutional language is dicta and that the decision rested on the reinterpretation of the Rules of Decision Act. *See, e.g.*, CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 56 and authorities cited nn.15-16 (5th ed. 1994); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 313-14, 313 n.146 (3d ed. 1999). But that belief is wishful thinking, although *Gasperini*'s revisionist reading may revive it, *see infra* note 81.

In *Erie* the Court cited then-current scholarship opining that the Rules of Decision Act was intended to embrace state decisional law, *see Erie*, 304 U.S. at 64 n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923)), but that scholarship did not form the basis of the decision, for in a later passage the Court explained:

> If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Id. at 77-78 (footnote omitted).

In any event, reliance upon the meaning of a statute enacted in 1789 presents grave difficulties. A more recent study urges that Justice Story in *Swift v. Tyson* correctly interpreted the Rules of Decision Act because the phrase "laws of the several states" precisely referred to the general law rather than to the law of any particular state. *See* Patrick Borchers, *The Origins of Diversity Jurisdiction, The Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEXAS L. REV. 79, 101 (1993). No winner has yet emerged in this battle over the meaning of the First Judiciary Act. For a general discussion regarding difficulties in interpretation of old statutes, see Michael A. Berch & Rebecca W. Berch, *Proposals to Amend the Civil Rights Act, 42 U.S.C. § 1983*, 29 MCGEORGE L. REV. 825 (1998).

[14] *Erie*, 304 U.S. at 75.

[15] Justice Reed elicits this dichotomy. *See id.* at 91-92 (Reed, J., concurring) (stating that "[t]he line between procedural and substantive law is hazy").

Drawing the line between substance and procedure has not been easy. Issues that seem procedural have been found to be substantive – and vice versa. For example, the Court decided that a state statute of limitations that would bar a state-based cause of action, clearly a procedural rule in other contexts, was so "outcome determinative" that it should be applied in a federal equity proceeding, although ordinarily federal rules govern procedure in federal courts.[17] The Court characterized the issues posed in *Erie* and *Guaranty Trust* as substantive for purposes of determining a federal court's choice of law and defined a matter as substantive if it significantly affects the outcome of the case.[18] During the next decade, four cases[19] found state law outcome determinative despite the existence of one or more of the following factors: (i) the ostensible nature of the laws at issue; (ii) the presence of a federal statute, rule of civil procedure, or custom seemingly pointing in another direction; (iii) strong policy reasons favoring a uniform federal rule[20]; and (iv) doubt at the conclusion that the issue was in fact outcome determinative in the *Guaranty Trust* sense.[21] Truly the pendulum had swung quite far

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[16] *See* Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (ruling that burden of establishing contributory negligence is governed by state law and not covered by Federal Rule 8(c), which relates to matters of pleading); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (stating that question of burden of proof relates to substantial right and not merely to rule of practice).

[17] Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945).

[18] According to Justice Frankfurter, "'substance and procedure' are the same key words to very different problems . . . . Each implies different variables depending upon the particular problem for which it is used." *Id.* at 108. *Erie* and *Guaranty Trust* held that a federal suit based on diversity of citizenship should not yield substantially different results depending upon the judicial system in which it is filed. But determining whether an issue is substantive and hence requires application of state law, as opposed to procedural, which requires the application of federal law, has proved difficult. As Justice Ginsburg has noted, it would not do merely to apply indiscriminately concepts developed in other areas of the law:

> We would do well, however, to recall in this context a sage and grave warning: "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."

City of Chicago v. International College of Surgeons, 522 U.S. 156, 184 (1997) (Ginsburg, J., dissenting) (citing Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933)).

[19] *See* Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 205 (1956)

(holding that federal courts are bound by state decisions making arbitration agreements revocable); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (holding that action was barred by state statute of limitations requiring service of summons to toll statute despite Rule 3 of Federal Rules of Civil Procedure's provision that action commences by filing of complaint); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (applying state door-closing statute to bar claim in federal court); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949) (ruling that state statute requiring plaintiffs in derivative actions to post bond was not merely procedural).

Bernhardt presaged several issues that the Court would subsequently confront. In that case, the Court held, as a matter of statutory construction, that state law applied and not the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1947). *Bernhardt,* 350 U.S. at 208. It noted in passing that if the Arbitration Act did apply, "a constitutional question might be presented. *Erie v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases." *Id.* at 202 (citation omitted). Eleven years later, the Court held that the Act did apply in a diversity case. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

[20] Even in more recent times the Court has rejected the interest-analysis approach in favor of the mechanical application of state law. In *Day & Zimmermann, Inc. v. Challoner,* 423 U.S. 3, 4 (1975), for example, despite compelling policy reasons for re-examining the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.,* 313 U.S. 487 (1941), the Supreme Court reaffirmed that state conflict-of-laws rules prevail in diversity cases, brusquely vacating the court of appeals decision and remanding for consideration in light of *Klaxon.* And in *Griffin v. McCoach,* 313 U.S. 498, 503 (1941), decided the same year as *Klaxon,* the Court applied the forum state's conflict-of-laws rules in an action brought under the Federal Interpleader Act, an Act that authorizes nationwide service of process even though the state court could not have constitutionally acquired personal jurisdiction over all the claimants.

[21] One could also consider *Angel v. Bullington,* 330 U.S. 183, 191 (1947), which held that a North Carolina statute forbidding deficiency judgments in mortgage foreclosures binds a federal court. Since a state *statute* covered the area of deficiency judgments even *Swift* might have compelled its application by a federal court. Yet the state court had opined that "[t]he statute operates upon the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the sub-

in the direction favoring the application of state law.[22]

Then in 1958 the Court again changed directions. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[23] raised the question of the mode of trial in a diversity case. In the forum state, the issue—whether the plaintiff was a statutory employee within the meaning of the worker's compensation statute—would have been decided by the judge. Although the Court refused to hold that the constitutional command of the Seventh Amendment displaced the state rule, it nevertheless referred to its influence in determining the distribution of functions between trial judge and jury.[24] The Court assumed that if the state rule were "bound up"[25] with the state-created

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stantive law itself. It is a limitation of the jurisdiction of the courts of this state." Bullington v. Angel, 16 S.E.2d 411, 412 (N.C. 1941). The Supreme Court, citing *Erie,* held that the state statute barred an action in federal court. *Angel,* 330 U.S. at 191-92. *Angel,* however, also rests on res judicata grounds since a North Carolina state court judgment denying the deficiency had previously been entered. *Id.* at 192-93.

[22] Yet in another line of cases, commencing with *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 13-14 (1941) (applying Rule 35 of Federal Rules of Civil Procedure and requiring submission to physical examination despite state law to contrary), the Court has carefully hewn to the line of applying federal rules and statutes regulating pleading, practice, and procedure in federal courts. *Hanna v. Plumer*, discussed below, attempted to harmonize these seemingly disparate lines of authority. *Gasperini* blurs the lines.

[23] 356 U.S. 525 (1958).

[24] In *Byrd*, the Court reserved the Seventh Amendment issue: "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue" presented in the case. *Byrd*, 356 U.S. at 538 n.10.

[25] The bound-up doctrine, according to Judge Posner, requires the court to ask two questions: (1) is the state rule so likely to dictate outcomes that it will cause significant forum shopping if not applied in the federal court and (2) is the state rule so entwined with the Federal Rules of Civil Procedure that it is likely to impair the integrity of the federal procedure if it is applied in diversity cases in the federal courts? If the answer to (1) is yes and (2) is no, then applying the state rule in diversity cases in federal court is appropriate and consistent with the principles of both *Erie* and the Rules Enabling Act. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310-11 (7th Cir. 1995). Judge Posner expressly left unanswered the more difficult issue that arises if the answer to both questions is "yes." As a result, students and practitioners still do not know the full scope of the "bound-up" doctrine and must struggle to determine its ap-

rights and obligations, then state law would apply.[26] Finding no such interdependence, the Court then asserted that if outcome determination were the only consideration, a "strong case might appear for saying that the federal courts should follow the state practice."[27] Nevertheless, there were strong countervailing considerations favoring jury trials, and the state rule in question—not being bound up with the rights and obligations of the parties—should not displace the allocation of functions in the federal system between trial judge and jury.

As is readily apparent, in those areas traditionally thought of as procedural, *Byrd* proffers a balancing test, one that defers to the state rule if it is bound-up with the state-based rights and obligations and prefers the federal rule if "affirmative countervailing considerations" tilt the balance in favor of applying the federal rules in situations that are not bound-up, even if they are possibly outcome determinative. For the next seven years, application of *Byrd's* balancing test caused significant problems for practitioners and the lower courts.[28]

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propriate application. Regrettably, *Gasperini* also left this question unanswered. *See infra* notes 99-102 and accompanying text.

[26] *Byrd*, 356 U.S. at 535.

[27] *Id.* at 537.

[28] The problems created by *Byrd* were aptly summarized by Professor Charles Alan Wright:

> Though Byrd was a welcome retreat from the more extreme position of Guaranty Trust [v. York], and it provided a means for continuing to apply the Civil Rules in many areas, there was considerable difficulty in applying the *Byrd* test. Able courts—and judges within a single court—were divided in situations that were distinguishable but perhaps not really different. The interest of the federal system in having a uniform procedure in its courts was given heavy weight by the Fifth Circuit but only "slight" weight by the Seventh Circuit. The presence or absence of a specific federal statute or rule was thought decisive by Judge Friendly and a majority of the Second Circuit but Judge Clark of that court gave it little weight as also did the Seventh Circuit.
>
> The difficulty in applying the *Byrd* test probably stemmed from the fact that there is no scale in which the balancing process called for by that case can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the interest in preserving uniformity of result with the state court. Even if there were such a scale, the weights to be put in it must

Perhaps recognizing the difficulty of applying *Guaranty Trust's* outcome determinative test or *Byrd*'s balancing test, the Court radically shifted directions in *Hanna v. Plumer.*[29] The question at issue was whether the federal court should apply a state's in-hand service of process rule or the federal rule allowing service by leaving copies of the summons and complaint at the defendant's residence.[30] The Court recognized that applying the state rule would result in an immediate victory for the defendant and applying the federal rule would assure the continuation of the litigation, which might result in a judgment for the plaintiff.[31] Nevertheless, the Court applied the Federal Rule and set forth a bifurcated test for determining whether to apply state or federal law; with respect to a validly enacted rule directly on point, courts should disregard contrary state provisions[32]: "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act

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> be whatever the judges say they are. Uniformity of procedure among the federal courts is thought "important" by one court but of only "slight" weight by another. There is no objective standard by which it can be said that one of those evaluations is "wrong" and the other is "right."

CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 381-82 (4th ed. 1983) (citations omitted).

[29] 380 U.S. 460 (1965).

[30] Rule 4(d)(1) of the Federal Rules of Civil Procedure (now 4(e)(2)) provides in pertinent part as follows:

> Service upon an individual . . . may be effected . . . by leaving copies [of the summons and the complaint] at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .

The provisions of the state law read in pertinent part as follows:

> [A]n executor or administrator shall not be held to answer to an action . . . which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator . . . .

Hanna, 380 U.S. at 462 (citing MASS. GEN. LAWS, ch. 197, § 9 (1958)).

[31] *Id.* at 466.

[32] *Id.* at 471.

nor constitutional restrictions."[33]

Never mind that the state rule may be "bound-up with the rights and obligations of the parties."[34] Disregard such formerly controlling concerns as outcome determination, forum shopping, or inequitable administration of the laws. If a federal rule is directly on point and it arguably regulates procedure, apply it. The Rules Enabling Act,[35] rather than the Rules of Decision Act,[36] became the touchstone. The Court cavalierly distinguished those precedents refusing to follow a federal rule as having decided only that the federal rule did not directly apply.[37]

For situations not covered by a statute or a Rule of Procedure adopted pursuant to the Enabling Act, the Court seemingly backed away from the *Byrd* balancing test in favor of applying the federal rule or custom unless it would encourage forum shopping or foster the inequitable administration of the laws.[38] Later cases attempted to hew to this line of reasoning.[39]

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[33] *Id.* This test drew sharp rebuke from Justice Harlan: "Whereas the unadulterated outcome and forum-shopping test may err too far toward honoring state rules, I submit the Court's 'arguably procedural, *ergo* constitutional' test moves too fast and far in the other direction." *Id.* at 476 (Harlan, J., concurring). *Gasperini* may actually endorse the Harlan criticism of moving too fast and far in the direction of applying the federal rule. See discussion *infra* at notes 111-24 and accompanying text.

[34] *Byrd*, 356 U.S. at 535.

[35] The Rules Enabling Act, 28 U.S.C. § 2072 provides in part: "The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals . . . . Such rules shall not abridge, enlarge, or modify any substantive right . . . ." 28 U.S.C. § 2072(a) and (b) (1994).

[36] For the text of the Rules of Decision Act, see *supra* note 1.

[37] *Hanna*, 380 U.S. at 470 (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)). Justice Harlan, in concurrence, thought *Ragan* was wrongly decided. *Id.* at 476-77 (Harlan, J., concurring). In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the Court unanimously reaffirmed *Ragan*. After noting that stare decisis weighs heavily, it held that the rule in question was not as broad as the plaintiff claimed and was not broad enough to overcome application of state law. *Id.* at 749-50. One may wonder how this rather restrictive interpretation of Rule 3 measures against the expansive interpretation of the federal rule in *Burlington Northern Railroad v. Woods*, 480 U.S. 1 (1987), and the federal statute in *Stewart Organization, Inc. v. Ricoh*, 487 U.S. 22 (1988). *See infra* note 39. But it seems that *Gasperini* signals a return to the era of restrictive interpretation.

The past generation has witnessed a resurgence of federalism and a decline in judicial crafting of remedies.[40] This resurgence, noted by all but the most unobservant or diehard believers in the majesty of federal law, has naturally had its impact on the *Erie/Hanna* line of cases. Lower federal courts began to apply state laws despite the rather straightforward command of *Hanna*. For example, undoubtedly encouraged by the Court's readings of Rule 3 in *Ragan* and *Walker*,[41] several courts have interpreted a federal rule as not being directly on point. One interesting line of cases relates to door-closing statutes that require plaintiffs to certify the merits of their claims before bringing suit. In *Trierweiler v. Croxton & Trench Holding Corp.*,[42] the Tenth Circuit Court of Appeals held that Rule 11 of the Federal Rules of Civil Procedure[43] did not occupy the applicable field. The court therefore considered whether the state rule could be applied in the relatively unguided *Erie* area by analyzing outcome determination in light of the system's concerns regarding forum shopping and inequitable administration of the laws.[44] The court noted its reluctance to apply a state-created procedure that would encroach upon the administration of justice in the federal courts.[45] Nevertheless, it adopted the state test requiring the plaintiff

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[38] The Court has waffled on whether both forum shopping and inequitable administration of the law must be found or whether finding only one element will suffice. *Compare* Hanna v. Plumer, 380 U.S. at 468 (establishing twin aims of *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of laws) *with id.* at n.9 (asking whether application of rule would unfairly discriminate against citizens of the forum state or would be likely to cause plaintiff to choose federal court) *and* Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. at 27 n.6 (stating that "if application of federal judge-made law would disserve these two policies, the district court should apply state law") *and* Walker v. Armco Steel Corp., 446 U.S. at 753 (finding that "although in this case failure to apply [state law] . . . might not create any problem of forum shopping, the result would be an 'inequitable administration' of the law").

[39] In *Walker*, 446 U.S. at 741, the Court confronted anew the question faced in *Ragan*: whether Rule 3, which provides that the filing of a complaint commences an action, tolls a state statute of limitations in a diversity action. It held that the state rule requiring service of process was the critical date for tolling purposes. *Id.* at 751-52. It observed that *Hanna* had specifically held that Rule 3 was not broad enough to control the issues and that stare decisis commanded deference to prior opinions. *Id.* at 750. Ironically, however, Rule 3 does control the tolling of federal statutes of limitation in federal cases.

In *Burlington Northern Railroad v. Woods*, 480 U.S. 1, 8 (1987), the Court held that Rule 38 of the Appellate Rules of Civil Procedure, rather than an Alabama statute, governed the taxation of costs against an appellant. The Rule in question provided as follows: "If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38. The Court reasoned that the Rule affords the appellate courts discretion in awarding damages, whereas the Alabama statute required a ten percent penalty. *Id.* at 7-8. Ruling in this manner allowed the Court to avoid a constitutional issue presented in the case challenging the mandatory penalty as violative of the Equal Protection and Due Process clauses.

Finally, in *Stewart*, 487 U.S. at 32, the Court held that the transfer statute, 28 U.S.C. § 1404 (1948), permitted a federal court to consider a forum-selection clause in a contract. That statute provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994). The Court refused to follow a contrary Alabama practice. *Stewart*, 487 U.S. at 32. Although the case presented federal question as well as diversity jurisdiction, the Court squarely based its decision on the application of the federal statute to diversity cases. *Id.* Just why the general federal-statute in this case directly contravenes the Alabama practice disregarding forum-selection clauses whereas Rule 3 of the Federal Rules of Civil Procedure, which provides that the filing of a complaint commences an action, does not directly impact the state service provision for commencement, is not clear.

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[40] In the area of government litigation, the Court has retreated from mechanical adherence to the dogma of national uniformity espoused in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (mandating that suits by United States on commercial paper issued by United States must be governed by uniform federal rule). In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979), the question concerned the priority of government liens. In determining whether to fashion federal common law or use state law, the Court observed that "businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved . . . . Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence . . . . Thus, the prudent course is to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id.* at 739-40.

For recent examples of this resurgence of federalism, see *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Tenth Amendment renders unconstitutional Congressional attempt to commandeer state employees to perform background checks on potential gun purchasers); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (finding that Indian Commerce Clause not source of power to abrogate Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Commerce Clause not source of power to legislate against guns in state schools).

In *Atherton v. FDIC*, 519 U.S. 213, 218, 221 (1997), the Court reiterated the *Erie* admonition that "there is no federal general common law" and that even in federal question cases, courts should resort to federal law only if there is a significant conflict between the state rule and some federal policy or interest.

Last term reached the apogee of deference to the principles of federalism in three 5-4 opinions. *See* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (ruling that state cannot be sued in its own courts under FLSA); College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 119 S. Ct. 2219, 2229 (1999) (holding that state did not waive sovereign immunity by engaging in certain interstate activities); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199, 2205 (1999) (holding that Congress cannot abrogate sovereign immunity under Commerce Clause or Patent Clause). We cannot predict with any certainty just how these cases will affect the *Gasperini* line of cases, except to note confidently that they should not retard the erosion of the uniform application of federal rules.

[41] Yet, in a footnote to *Walker*, the Court stated that lower courts should not

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narrowly construe a federal rule in order to avoid an *Erie* problem. *See Walker*, 446 U.S. at 750 n.9 (stating that "[t]his is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning"). This generous reading of the meaning of a federal rule should be contrasted with the Court's reading of the rule in *Gasperini*, 518 U.S. at 427 n.7 (stating that "federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies"), and *Stewart*, 487 U.S. at 37-38 (stating that "in deciding whether a federal procedural statute or Rule of procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits") (Scalia, J., dissenting). In point of fact, the *Gasperini* Court restrictively construes Rule 59 of the Federal Rules of Civil Procedure in such a way as to avoid a direct confrontation with *Erie* principles. *See infra* note 79 and accompanying text.

[42] 90 F.3d 1523 (10th Cir. 1996). *See also* RTC Mortgage Trust v. Fidelity Nat'l Title Ins. Co., 981 F. Supp. 334, 344-45 (D.N.J. 1997) (applying New Jersey affidavit of merit statute).

[43] Rule 11 of the Federal Rules of Civil Procedure requires that a pleading be signed by an attorney, or by the party, if not represented by an attorney. The signature constitutes a certification that to the signatory's knowledge formed after a reasonable inquiry the allegations have evidentiary support. FED. R. CIV. P. 11(b)(3). The Rule prescribes penalties if the allegations do not have factual support. *Id.* at (c). In another context, the Court relied on its inherent power to control behavior that thwarts the just operation of the legal system, specifically holding that Rule 11 does not occupy the entire field. *See* Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

[44] *Trierweiler*, 90 F.3d at 1540.

[45] *Id.*

to certify the merits of the claim, noting that doing so would not seriously overburden the federal courts.[46] Citing *Byrd*, the court reasoned that applying the state rule would not alter the "'essential characteristics' of the federal system."[47] Indeed, it found that "declining to apply the statute in federal court . . . would create a rule of law likely to produce substantially different results in state and federal court."[48] On reflection, however, it appears that rejecting the state rule would merely postpone the stage at which some noncertifiable cases would be dismissed. One may properly question whether these incidental consequences rise to the stature of the systemic concerns, such as forum shopping and the inequitable administration of the laws, which inspired *Erie* and its progeny.[49]

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] The court viewed the issue as one involving a systemic concern: A plaintiff alleging professional negligence is likely to seek a forum that does not require the certificate of review hurdle to avoid extra cost, to allow more time to build a meritorious case, or to increase the settlement value of the claims once litigation begins. If the certificate of review requirement applies in state but not federal court, the burden would penalize state plaintiffs but not those who file in federal court under diversity jurisdiction. *Id.* at 1541.

To the same effect, *Neill v. Gulf Stream Coach, Inc.*, 966 F. Supp. 1149 (M.D. Fla. 1997), applied Florida law establishing special pleading requirements and discovery procedures for supplemental punitive damages claims:

> Florida courts have consistently construed [the Florida statute] as creating a substantive legal right not to be exposed to a claim for punitive damages—as well as any contemplated financial worth discovery—without a prior judicial determination that a reasonable evidentiary basis exists for the claim. This right to be free from a punitive damages claim affords the party opposing such a claim protection from the expense of having to litigate meritless claims and the concomitant increase in the settlement value of a case once a claim for punitive damages is added.

Id. at 1155-56 (citations omitted).

One may analyze the effect of these decisions on *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). In that case, the Court observed that Federal Rule 35 authorizes mental and physical examinations of a party once the party seeking the examination affirmatively establishes that the other party's condition is in controversy and that good cause exists for the examination. *Id.* at 106. Recall that in *Sibbach v. Wilson*, 312 U.S. 1, 16 (1941), the Court concluded that Rule 35 controlled rather than a contrary state forum policy forbidding compulsory examinations. Now assume that, as part of a tort reform package, the state enacts a statute regulating

In another line of cases, federal courts have applied state evidence laws rather than a clear contrary command of a Federal Rule of Evidence.[50] For example, several cases hold

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examinations of parties that is either more restrictive or more liberal than the federal rule. Would the Court apply the state rule? If so, would it do so because of *Erie* concerns? Or only because the rule in question adopts a good-cause requirement that itself may incorporate the principles underlying the state law?

[50] *See* Wray v. Gregory, 61 F.3d 1414, 1417-18 (9th Cir. 1995) (holding that inadmissibility of findings of medical review panel was mandated by application of state law); Daigle v. Maine Med. Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994) (holding that admissibility of findings of medical review panel is determined by state law standards); DiAntonio v. Northampton-Accomack Mem'l Hosp., 628 F.2d 287, 290 (4th Cir. 1980) (same).

Another potential conflict relates to the admissibility of expert testimony in federal diversity cases. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), a diversity case, the Court held that the *Frye* test for admissibility of scientific evidence—general acceptance in the particular field—had been overruled by the Federal Rules of Evidence in favor of a more limited gatekeeper function scenario. *Daubert* brushed aside the *Erie* implications in a footnote:

> Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie* . . . .

Id. at n.6 (citation omitted).

Assume that under the *Daubert* standard, a district court would allow the introduction of polygraph tests, as the Arizona district court did in *United States v. Crumby*, 895 F. Supp. 1354, 1361 (D. Ariz. 1995). Assume that state law disallows the introduction of these tests. *See, e.g.,* Gleeton v. State, 716 So. 2d 1083, 1087 (Miss. 1998) (disallowing polygraph). How should a Mississippi federal court rule on the introduction of polygraph results in a diversity case? Before *Gasperini*, the answer was clear: A federal court would follow the federal rule. After *Gasperini*, the answer is in doubt. Perhaps a court should still apply the federal rule, citing the *Daubert* footnote.

But we have questions. First, is the federal rule as clear as the *Daubert* Court indicates, especially in light of *Gasperini's* conservative approach in determining that Federal Rule 59 was not directly on point in that case? Second, is the Court intimating that federal rules adopted under the authority of the Enabling Act should be read more narrowly than the congressionally enacted Federal Rules? This suggests that a hidden justification for the *Daubert* approach may lie in the congressional intent. Consider that Congress has specifically designated the areas in which state law applies. *See* FED. R. EVID. 302 (presumptions); FED. R. EVID. 501 (privileges). Perhaps courts should not extend state law to other areas, even if a Federal Rule is not directly and clearly on point. To the contrary, however, the Court received the congressional direction to radiate "judge-made" law, and *Erie* should not stand in the way.

that state law trumps Rule 407, which excludes evidence of subsequent remedial measures.[51] These decisions do not easily fit within the conceptual framework of *Hanna* and its progeny. The Federal Rules of Evidence were enacted by Congress, which has the undoubted authority to promulgate rules of evidence[52] subject, of course, to constitutional constraints. These rules are supposed to govern the conduct of judicial proceedings in the federal courts and should pass constitutional scrutiny under the Necessary and Proper Clause. Indeed if Congress lacks the power to promulgate these evidence rules, then they should not apply in diversity cases regardless of the existence of contrary state laws or rules. But then what rule would apply? Or to take another example: What if, as often happens, a federal question case also presents supplemental state-law claims? If the Federal Rule applies to the federal claim, which rule would apply to the supplemental claim?[53]

In any event, had the Federal Rules of Evidence been promulgated under the Rules Enabling Act the *Gasperini* approach would arguably still dictate the application of the state rule and the introduction of the polygraph evidence because the admission or disallowance of such evidence has the same forum-shopping potential as does the introduction of scientific evidence generally.

[51] *See, e.g.,* Misener v. General Motors, 924 F. Supp. 130, 133 (D. Utah 1996) (noting Tenth Circuit doctrine that state law governs subsequent remedial measures and that Rule 407 of Federal Rules of Evidence applies only if there is no contrary state law). *But see* Kelly v. Crown Equip. Co., 970 F.2d 1273, 1277-78 (3d Cir. 1992) (stating that Federal Rule 407 applies because it is "arguably procedural").

[52] If the Rules of Evidence were promulgated by the Court pursuant to the Rules Enabling Act, they would of course be subject to the statutory limitation not to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). After *Gasperini*, there will be even fewer occasions to consider whether any Federal Rule of Civil Procedure is invalid as exceeding the authority of the Rules Enabling Act. Through restrictive interpretation of a Rule the clash between federal and state law will be avoided. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 304 (2d ed. 1994) (noting that no case has declared a rule to be invalid as exceeding authority granted in Rules Enabling Act). Indeed, through the guise of statutory construction many difficult questions, even those of constitutional dimension, can be avoided.

[53] In *Martinez v. Gayson*, No. 95-CV-3788, 1998 U.S. Dist. LEXIS 12281 at *13 (E.D.N.Y. June 30, 1998), a post-*Gasperini* case, the district court examined which law should apply in determining the propriety of a damage award in a supplemental state-law claim. After noting the conflicting decisions in the Second

Other troublesome areas[54] exist in which the courts have been groping to harmonize federalism principles with the *Erie/Hanna* line of cases. *Gasperini*[55] afforded the Court a unique opportunity to calm these troubled waters.

III. THE DECISION

Invoking the diversity jurisdiction of the district courts,[56] Gasperini filed an action for damages against the Center for Humanities, Inc., resulting from the Center's admitted loss of 300 original transparencies depicting events and places in Central America.[57] At trial, Gasperini's expert testified that the "industry standard" valued a lost transparency at $1,500.[58] Gasperini testified that his earnings from photography over a ten-year period totaled $10,000, but that he intended to produce a book containing his best photographs.[59] The jury awarded Gasperini $450,000.[60] The district judge summarily denied the Center's Rule 59[61] motion for a new trial

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Circuit, it examined a jury's lump-sum damage award encompassing both federal and state claims under both standards. *Id.* at *14-*18. This seems curious. If the award had been made under both federal and state law, then a lump-sum verdict should be upheld under the more deferential standard: the federal "shock the conscience" standard. Where, of course, federal law caps recovery and a lump sum verdict embracing federal and state claims exceeds the cap, the excess should be allocated to the state claim. In that event, state law governs the question of the excessiveness of the allocated portion of the award.

[54] *See* 19 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4511, at 15-22 (2d ed. 1996) (suggesting other unresolved areas); *see also* Hottle v. Beech Aircraft Corp., 47 F.3d 106, 110 (4th Cir. 1995) (applying state rules barring introduction of evidence of party's internal practices to prove negligence since those rules are sufficiently bound up with substantive state policy).

[55] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996).

[56] *Id.* at 419.

[57] *Id.*

[58] *Id.* at 420.

[59] *Id.*

[60] *Id.*

[61] Rule 59 of the Federal Rules of Civil Procedure governs the allowance of new trials:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been

on the grounds that the jury had awarded excessive damages.[62] The Court of Appeals for the Second Circuit vacated the judgment and, pursuant to a New York statute giving New York appellate courts the power to determine *de novo* whether the damage award "materially deviated" from an amount that would be considered "reasonable compensation" under New York law, ordered a new trial unless Gasperini agreed to a reduced award of $100,000.[63] The Supreme Court granted certiorari to decide what standards the federal courts should apply in reviewing the alleged excessiveness of a jury award of damages in a state-law-based claim.[64]

Before 1986 trial courts in both the state and federal systems in New York had reviewed jury awards claimed to be excessive to see whether they "shocked the conscience" of the court. Appellate courts reviewed the trial court findings for abuse of discretion.[65] Then, as part of a tort reform measure, New York codified a new standard for the judicial review of the size of jury awards:

> In reviewing a money judgment . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.[66]

After citing legislative history to the effect that the "shock the conscience" standard did not adequately constrain the size of jury awards[67] and noting that the statute implicitly requires

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granted in actions at law in the courts of the United States. . . .

FED. R. CIV. P. 59(a).

[62] *Gasperini*, 518 U.S. at 420.

[63] *Id.* at 420-21.

[64] *Id.* at 422.

[65] *Id.* at 422-23 (noting that appellate judges in both state and federal courts ordinarily "deferred to the trial court's judgment").

[66] *Id.* at 423 (citing N.Y.C.P.L.R. 5501(c) (McKinney 1995)).

[67] *Id.*

trial judges as well as appellate courts to review the size of the award in light of awards previously approved,[68] the Court turned to the question whether the statute should apply in diversity cases in federal court and, if so, to what extent.

Following the *Erie* formulation of prior years, the parties took predictable positions on the proper characterization of the New York standard of review: The Center contended that the statute was substantive; Gasperini argued that it was procedural and, if applied, would impermissibly intrude on the jury's right to determine damages subject only to the most limited review under the Reexamination Clause of the Seventh Amendment.[69] The Court quickly concluded that the statute combines both substantive and procedural aspects for *Erie* purposes.[70] Acknowledging the apodictic proposition that New York could provide a statutory cap on damages and that such a cap would be a substantive provision that a federal court sitting in a diversity capacity would apply,[71] the Court found that the lower court must apply the "materially deviates" standard.[72] The Court stated that the statute "differs from a statutory cap principally 'in that the maximum amount recoverable is not set by statute, but rather is determined by case law.'"[73] It opined that in order to prevent forum shopping and inequitable administration of the laws, the twin aims of *Erie* recognized in *Hanna*, district courts must apply the more rigorous review required by the New York statute.[74]

The Court then analyzed the effect of the statute on the uniform application of federal standards of appellate review in the federal system and determined that the state statute could not apply because, in the federal system, appellate courts have only the power to review a district court's legal determinations for legal error, its discretionary rulings for abuse of discretion, and its factual determinations for clear error.[75] Any other review of lower court decisions would interfere with "[a]n essential characteristic of [the federal court] system."[76] Granting federal appellate courts the power to make de novo determinations of "material deviation" would require the appellate courts to engage in factfinding, in derogation of the Seventh Amendment and the principles set forth in *Byrd*.[77] Thus, the Supreme Court held that the appellate court erred in its de novo review, vacated the judgment of the Second Circuit, and remanded the case for the district court to test the excessiveness of the award by the New York statute's "deviates materially" standard.[78]

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[68] *Id.* at 425.

[69] *Id.* at 426.

[70] *Id.*

[71] *Id.* at 428.

[72] *Id.* at 438.

[73] *Id.* at 429 (quoting amicus brief filed on behalf of City of New York).

[74] *Id.* at 430.

Whether intended or not *Gasperini* changes the analysis of the application of state law in several material respects. It redefines the rationale of *Erie*,[79] revitalizes *Guaranty Trust*, and, while ostensibly relying upon *Hanna* in several passages of the opinion, interprets Rule 59 narrowly—contrary to *Hanna*'s command—so as to avoid a head-on collision with state law. The extent and effect of the change in direction may not be fully realized for decades.

The Court intentionally undermines the underpinnings of *Erie*. It casts *Erie* adrift from its constitutional moorings and relegates it to a case of mere statutory construction:

> Federal diversity jurisdiction . . . does not carry with it generation of rules of substantive law. As *Erie* read the Rules of

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[75] *Id.* at 437-38. *See* FED. R. CIV. P. 52(a) (setting forth clearly erroneous standard).

[76] *Gasperini*, 518 U.S. at 431 (quoting Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958)).

[77] *Id.* at 438.

[78] *Id.* at 439.

[79] For a discussion of the constitutional basis of the *Erie* doctrine, see 17 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 124-1 (3d ed. 1999); John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 700-06 (1974); Allan Ides, *The Supreme Court and the Law to be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 83-87 (1995). *See also infra* note 80 and accompanying text (discussing *Gasperini* majority's treatment of *Erie* rationale).

> Decision Act: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[80]

Justice Reed, in concurrence in *Erie*, would have wholeheartedly preferred the more limited statutory interpretation approach, but the Brandeis majority clearly rejected it.[81] The *Gasperini* Court should not covertly revise the rationale threescore years after the fact. If the Court believed the statutory construction analysis to be the better approach, as many scholars and judges do, it should have been clear and forthright about saying so.[82]

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[80] *Gasperini*, 518 U.S. at 426-27. If the Court relegates *Erie* to a statutory construction case, then many recurrent and intractable problems are avoided. Congress can certainly provide the rules of decision, whether substantive or procedural, in any diversity case subject of course to constitutional restrictions. The Court had already reached this result regarding procedural rules in the application of congressional statutes and judicial rules. *See Hanna*, 380 U.S. at 473-74. The latter power is circumscribed by the statutory limitation that the procedural rules may not abridge substantive rights. *See* 28 U.S.C. § 2072(b) (1994), *supra* note 35. As to substantive rights, the application of a New York statutory cap may be subject to congressional override, although the use of the Commerce Clause for such override seems problematic. *See supra* note 40. On the other hand, a direct confrontation between Rule 59 and a statutory cap would run afoul of the "substantive right" limitation contained in the Enabling Act.

There is also the niggling point that courts should not interfere with jury prerogatives. The Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. The Court previously has permitted directed verdicts, judgments notwithstanding the verdict, and new trials on the grounds that these devices or their analogues were used by common law judges in 1791, the time of the adoption of the amendments. *See* Galloway v. United States, 319 U.S. 372 (1943). As presciently observed by Justice Black in his dissent in *Galloway*, the Court has been chipping away at the right to a trial by jury:

> The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function.

Id. at 407 (Black, J., dissenting). It is pure fiction to classify a material change in the judge's role regarding the remittitur practice as one of law and thus beyond the constraints of the Seventh Amendment—a fiction "which no lapse of time or respectable array of opinion should make us hesitate to correct." Erie v. Tompkins, 304 U.S. 64, 79 (1938) (citing Justice Holmes). Deferring to a state law that intrudes on the two-hundred-year relationship between judge and jury in the federal system simply compounds the problem.

[81] *Erie*, 304 U.S. at 90-92 (Reed, J., concurring).

The majority opinion resurrects *Guaranty Trust's* outcome-determinative test, reasoning that the measure of damages is every bit as substantive for *Erie* purposes as was the statute of limitations involved in *Guaranty Trust.*[83] Realizing that most rules of procedure might well be found to be outcome determinative if analyzed under the *Guaranty Trust* test, the Court approvingly cites *Hanna* as modifying the test: "[*Hanna*'s] application must be guided by the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[84] What happened to the *holding* of *Hanna* that a federal rule on point must govern unless it is clearly unconstitutional? The majority's discussion of the issue, which is more fully elaborated in Justice Scalia's dissent, lies buried in a footnote.[85]

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[82] The statutory foundation has the distinct advantage of giving Congress latitude in changing the result of judicial opinions deferring to state laws that arguably affect outcome but do not clearly affect primary rights. *See Hanna*, 380 U.S. at 474-78 (Harlan, J., concurring). Although this shift represents a welcome departure from previous jurisprudence, and one that might have motivated the Court to change directions, it should not have been pronounced *ex cathedra.*

[83] *Guaranty Trust* clings to the notion that federal courts are independent of the states and may apply different remedies for admittedly state causes of action, even if the rules are indeed outcome determinative. In a remarkable, often overlooked passage of the opinion, the Court refuses to endorse wholeheartedly the adoption of state equitable remedies in a diversity case:

> This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court . . . . State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.

Guaranty Trust, 326 U.S. at 105-06.

Guaranty Trust is quite concerned with maintaining "a federal system [as] an independent system for administering justice to litigants who properly invoke its jurisdiction." *Byrd*, 356 U.S. at 537. So too are *Byrd* and *Hanna. Gasperini* lost sight of this vision.

[84] *Gasperini*, 518 U.S. at 428 (recognizing *Hanna* as "pathmarking case").

The majority does not read Rule 59 of the Federal Rules of Civil Procedure as requiring the application of the "shock the conscience" standard to new trial motions.[86] Thus the Court concluded that the Rule and the New York statute did not directly collide, thereby rendering inapposite the holding of *Hanna*.[87] The opinion had recited—with approval—the obser-

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[85] *Id.* at 437 n.22.

[86] Nor does Justice Stevens. *Id.* at 440 n.1 (Stevens, J., dissenting).

[87] A decade after *Hanna* Professor John Hart Ely identified the four sources of federal law that might come into conflict with a state rule: provisions of the United States Constitution, federal statutes, Federal Rules of Procedure promulgated pursuant to the Rules Enabling Act (including judicial interpretations of these sources), and federal decisional law based on custom and usage. *See* Ely, *supra* note 79. Although it may appear that *Gasperini* affects only the latter area, *see* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think The Supreme Court Is Doing A Halfway Decent Job In Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 970 (1998), the opinion's grudging interpretation of Rule 59 certainly casts doubt on which Federal Rules do remain in full force and effect. It also may reflect a resurgence of restrictive interpretations of constitutional provisions and federal statutes. For example, even in *Byrd*, the Court examined the mode of trial as "under the influence—if not the command—of the Seventh Amendment." *Byrd*, 356 U.S. at 537. In *Hanna*, the Court also emphasized that "*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe *housekeeping rules* for federal courts even though some of those rules will inevitably differ from comparable state rules." *Hanna*, 380 U.S. at 473 (emphasis added). This, of course, begs the question of what matters may be classified as *housekeeping* for *Erie-Hanna* purposes.

Although several authorities in the field have opined that Congress has the power to prescribe a federal statute of limitations for diversity actions as a housekeeping measure to bar stale claims, *see, e.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 294; Ely, *supra* note 79, at 726, one may wonder whether such deferential treatment would be accorded to the federal statute. Suppose, for example, that Congress chose a period shorter than that for most federal claims. Could it truly be said that the statute was passed in order to ensure that stale claims would not be heard? Would not the purpose of the statute be to reduce the workload of the federal courts? Under those circumstances, perhaps it is permissible to apply the statute since the decision would not bar another proceeding in state court and therefore might not be considered outcome determinative. But would not the sophisticated defendant seek to remove the state case and promptly request dismissal based upon the federal statute? The statute seems outcome determinative. Should the federal courts be permitted to undermine rights created under state law? Or take another example: Suppose Congress had passed proposed 28 U.S.C. § 1332(e)(1), vation that the Court "has continued since [*Hanna*] to interpret the federal rules to avoid conflict with important state regulatory policies."[88] The Court strained to follow that path.

Having cast aside *Hanna*'s main prong, the majority examined the twin aims of *Erie* and the "outcome affective"[89] aspect of the New York standard. It found that applying a "shock the conscience" standard, as opposed to the "materially deviates" standard, may encourage forum shopping and induce inequitable administration of the laws.[90] The Court did not examine, as formerly required by *Byrd,* the affirmative countervailing considerations, nor did it strive to preserve the historic relationship between judge and jury. And the Court was indifferent to whether its decision would alter "the essential character or

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which required a federal district court to "award to the party that prevails with respect to a claim in such action an attorney's fee." *See* Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 101 (1995). This statute might well inspire forum shopping and might create inequitable administration of the laws; yet, under *Hanna,* Congress would probably have the authority to impose such fees on losers regardless of state law to the contrary.

Under present practice, courts grant attorneys' fees to prevailing plaintiffs in class action litigation. After *Gasperini,* we assume that a state statute denying these awards would be enforced in federal court in a diversity case. The real clash with *Hanna* would emerge if the Federal Rules were amended to clearly permit the award of attorneys' fees. But would not the fee allowance violate the Rules Enabling Act's limitation regarding alteration of substantive rights? Perhaps the only way to enforce the federal rule in the federal courts in such cases is to argue that the award of reasonable attorneys' fees is procedural. Does the award of fees differ from the award of costs to the prevailing party?

[88] *Gasperini,* 518 U.S. at 438 n.22.

[89] *Id.* at 428.

[90] *Id.* In dissent, Justice Scalia questions whether district court opinions are accorded sufficient dignity that they might be considered law making. *Id.* at 466 (Scalia, J., dissenting). Even if they are, it is notable that rules relating to jury composition and other incidents of jury practice in federal courts often differ from and collide with those provided by state law. Yet, federal courts presumably would not defer to state decisions regarding the size, composition, and other incidents of jury trials. Finally, it is ironic that, on remand, the district court entered an award of $375,000, an amount not much different from the original jury award. Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765 (S.D.N.Y. 1997), *vacated and remanded,* 149 F.3d 137 (2d Cir. 1998). The Second Circuit directed the district court to enter judgment of $359,000 should Gasperini agree to a reduction of $15,000 based upon the erroneous inclusion of ten slides in the damage computation.

function of a federal court."[91] Indeed, *Byrd* and the influence of the Seventh Amendment are relegated to the preservation clause, to the all-or-nothing dichotomy of trial by judge or trial by jury.[92]

Gasperini leaves intact the preservation of the jury trial and, according to the Court, merely affects the legal standard to be applied in reviewing the size of a verdict.[93] But surely those standards affect the mode of trial in a very significant way: a way that implicates the Reexamination Clause of the Seventh Amendment.

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[91] *Byrd*, 356 U.S. at 539. Just how far *Gasperini* will alter the essential characteristics of the federal judicial system and impact Seventh Amendment concerns remains to be seen. Assume that a statute requires bifurcation of liability and damages issues in mass-tort cases. Would the federal courts in a diversity case be required to bifurcate despite federal common law custom to the contrary? Or suppose the state statute required bifurcation in such a way as to permit reexamination of an issue tried to the first jury by a different jury. As Judge Posner noted in *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), the right to a trial by jury guaranteed by the Seventh Amendment is to have "juriable issues" determined by the first jury, not reexamined by another finder of fact. Does *Gasperini* now require the subordination of these Seventh Amendment concerns? Now suppose the state statute, in order to promote settlement of complex cases, requires "reverse bifurcation" in mass tort cases, in which damages and causation issues are tried before liability questions. In a diversity case, must the federal court accede to the dictates of the state law or should it exercise its own judgment as to the method of trying the case? If, in any of the above cases, *Gasperini* would require the use of state law, how would the lower courts decide the mode of trial of state law claims that are supplemental to federal question jurisdiction? Certainly the method of trial in the two types of cases cannot be different. The only alternatives are to try the supplemental state claims in the same way as the federal claim or for the federal court to dismiss the state claims in the exercise of its discretion. The first alternative undermines the concerns of *Gasperini*; the second uindermines the efficiency concerns that inspired the use of supplemental jurisdiction.

[92] *Gasperini's* reliance on *Byrd* was specifically limited to its interpretation of the first clause of the Seventh Amendment—that is, to the question whether a litigant is constitutionally entitled to a jury trial—not to the Reexamination Clause or to its analysis of the proper resolution of *Erie* questions in general. *Byrd* had already been wounded and limited by *Hanna* and its progeny. *See, e.g.*, Gallagher v. Wilton Enters., 962 F.2d 120, 122 (1st Cir. 1992) (stating that *Hanna* overruled *Byrd*); *see also* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 4504, at 48-49 (2d ed. 1996) (noting uncertain status of *Byrd*); Ely, *supra* note 79, at 717 n.130 (stating that there is no longer any place in system for *Byrd's* balancing test); Ides, *supra* note 79, at 86 (opining that in light of *Hanna*, *Byrd*'s holding may no longer be "useful").

[93] *Gasperini*, 518 U.S. at 439.

According to the Court, the Seventh Amendment and Rule 59 of the Federal Rules of Civil Procedure codify the English common-law practice of granting new trials when the verdict appears to be against the weight of the evidence.[94] This standard for granting new trials seems far more intrusive on the sanctity of the jury verdict than does the application of the "materially deviates" standard. Certainly, if deference to jury verdicts is a desideratum under Seventh Amendment jurisprudence,[95] then applying a "materially deviates" standard more fully implements that policy than does a standard that allows a jury's verdict to be set aside if it is against the weight of the evidence. Under these circumstances, one wonders whether rejection of the "shock the conscience" standard does any violence to the sanctity of jury verdicts. Indeed, applying the more deferential New York standard more fully protects the sanctity of jury verdicts.

A different question would be presented if the New York statute permitted the trial judge to vacate the verdict if it differed from what the judge thought reasonable. Under those circumstances, there would be a significant federal interest in not upsetting the historic balance between judge and jury. But if *Gasperini* would require the application of the state rule in these circumstances, as the opinion indicates that it would, then one must sadly recognize, as did Justice Black more than fifty years ago, that we have traveled a long way on the path toward displacing the essential characteristics of a jury trial enshrined in the Seventh Amendment.[96]

Gasperini may be read as holding no more than that a state limit on damages, either by statutory monetary cap or imposed as a judicial standard to control jury awards, must be respected by a district court sitting in diversity. This result could have been reached by an approach that would have done less violence to established law. The Court could simply have hewn to the *Byrd* line of cases by finding New York's "materially deviates" standard "bound up" with the rights and obligations of the parties, thereby avoiding the need to analyze the "affirmative countervailing considerations" relating to the "federal system of allocating functions between judge and jury."[97] But the Court eschewed reliance on *Byrd* and flew directly to one of *Hanna*'s prongs: whether applying the state rule would encourage forum shopping or inequitable administration of the laws.[98] Alternatively, the Court could have found that the jury

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[94] *Id.* at 433.

[95] Perhaps the sanctity of the jury verdict itself is not at stake, but certainly the delicate relationship between judge and jury is. That relationship has all but been destroyed by the *Gasperini* logic.

[96] *See* Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting).

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[97] *Byrd*, 356 U.S. at 538. Because the Court did not cite *Byrd* in this context the question immediately arises whether *Byrd* continues on the wing. Despite several lower court opinions and the works of distinguished scholars, the Court in *Hanna*, arguably, intended to turn from the *Byrd* test, certainly in cases in which a federal statute or rule controls the issue, albeit with less certainty in areas that relate to the conduct of the federal trial and the relationship between the judge and jury.

Note the Court's insistence in *Gasperini* that lower courts should interpret federal rules to avoid conflict with important state policies. *See Gasperini*, 518 U.S. at 437-38 n.22. How would Rule 4's substituted service, the subject of the *Hanna* decision, be decided today under this test? And what happened to the approach in *Walker* that lower federal courts should not narrowly construe a federal rule in order to avoid an *Erie* problem? Does the *Walker* restriction apply to lower courts but not to the Supreme Court? That dichotomy makes no sense if the issue raises only the meaning of a statute or rule. It makes more sense if it relates to the power of a particular court to find a rule unconstitutional, which is precisely the issue that faced the courts in the *Erie* line of cases. After all, because the Supreme Court promulgates the rule perhaps only that Court should have the power to declare it null and void or unconstitutional as applied. But that doctrine has to our knowledge never acted as a restriction on lower federal courts. At most, it counsels deference to the constitutionality of the Court's rules.

[98] *Id.* at 467-68 (Scalia, J., dissenting). By jumping to this prong, the Court assumed that no federal rule was directly on point, a position soundly rejected by Justice Scalia in dissent. He reasoned as follows:

> [I] think the Court's *Erie* analysis is flawed. But in my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure . . . . That is undeniably a federal standard. Federal District Courts in the Second Circuit have interpreted that standard to permit the granting of new trials where "'it is quite clear that the jury has reached a seriously

award violated the federal standard: whether the standard adopted is "shock the conscience," outside the range of reasonableness, or "indisputably egregious."[99]

The Court expressly states that the "shock the conscience" standard is a "judge-made formulation in responding to excessiveness attacks on jury verdicts."[100] This discussion, however, begs the question. The source of the standard should make no difference if Rule 59 expressly incorporates it.[101] If Rule 59 had expressly provided the "shock the conscience" standard, would the Court have found that the standard alters the "substantive rights" of the parties in violation of § 2072(b) of the Rules Enabling Act? In analyzing the question, the Court would be inquiring into the "importance" of the state rule. Is this any different from the "bound-up" inquiry of *Byrd*? Suppose, on the other hand, a *federal* statute incorporates the

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> erroneous result'" and letting the verdict stand would result in a "'miscarriage of justice.'" (Citations omitted.) Assuming (as we have no reason to question) that this is a correct interpretation of what Rule 59 requires, it is undeniable that the Federal Rule is "'sufficiently broad' to cause a 'direct' collision with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." (Citation omitted.) It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the Court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."

Id. (Scalia, J., dissenting) (citing *Hanna*, 380 U.S. at 472).

[99] *See id.* at 466 (Scalia, J., dissenting) (stating that "[o]ne case, for example, says that *any* award that would not be sustained under the New York 'deviates materially' rule 'shocks the conscience'").

[100] *Id.* at 422.

[101] At one time, courts differed on whether the standard for directed verdicts and judgments notwithstanding the verdict was controlled by state or federal rules. *See* Daniel J. Hartwig Assoc., Inc. v. Kanner, 913 F.2d 1213, 1221 (7th Cir. 1990) (stating that "the test for granting a directed verdict is supplied by the law of the forum state"). Rule 50 now provides a federal standard that, at least prior to *Gasperini*, presumably would be applied by a federal court even if there were a contrary state standard. *See* Mono v. Peter Pan Bus Lines, Inc., 13 F. Supp. 2d 471, 476 (S.D.N.Y. 1998) (pretermitting issue by interpreting the standard as same under federal and state law).

"shock the conscience" standard. In that case, the "substantive rights" exception of the Rules Enabling Act would not apply. Should Congress have the power to trump the *state* statute? It certainly could not directly trump a state statutory ceiling on damages awards. But what if the federal statute regulates only the mode of effectuating the state policy, for example, by applying the "weight of the evidence" or "shock the conscience" standard? *Gasperini* leaves the resolution of these questions in doubt.

Just how far a state may go in altering the essential characteristics of a federal adjudication will continue to plague the lower courts until the Supreme Court offers additional—or clearer—guidance.[102] One thing is certain: *Gasperini* holds

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[102] *Gasperini* requires lower courts to consider whether a state substantive provision "can be given effect . . . without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini*, 518 U.S. at 426. This inquiry seems a return to *Byrd* modified in the sense that even "bound-up" provisions that unduly alter the federal scheme are not to be applied in federal court.

Justice Scalia posits a state rule that allows a defendant a second trial on damages with judgment ultimately in the amount of the lesser of the two jury awards and concludes from the majority opinion that it would have to be applied in the federal courts. *See id.* at 467 (Scalia, J., dissenting). The majority, however, disclaims any such intention. Such a "two-trial rule . . . surely would be incompatible with the existence of 'the federal system [as] an independent system for administering justice.'" *Id.* at 436 n.21.

Other similar examples, several of which are noted in Justice Scalia's dissenting opinion, will cause the courts difficulty. Suppose, for example, that a state statute authorizes a new trial if the judge disagrees with the jury award. Would application of this standard upset the essential characteristics of a federal court? Clearly, if *Byrd* has any vitality, the statute cannot totally abrogate the jury's role in awarding damages in a common-law action. But how far can state law intrude on jury discretion? Or suppose the New York statute required the parties to submit to the jury the similarly decided cases and the court to instruct that the jury's award should not materially deviate from the decided cases. Would that alter the essential function? Further, assume that the state trial courts are not given the authority to use the "materially deviates" standard, but that the function of determining whether a verdict materially deviates must be performed by the appellate court. After *Gasperini*, may we safely disregard the state statute in its entirety, or will the Court still permit the deviation-determination function to be performed by lower courts?

Now assume that the new state standard has no statutory antecedents but is a judge-made rule intended to ameliorate the problem of runaway juries. *See* that the Reexamination Clause of the Seventh Amendment prevents an appellate court from reviewing de novo the district court's ruling on the excessiveness of a jury verdict.[103] But the decision leaves unanswered several questions regarding the applicability of other provisions of the New York law. For example, the New York law allows additur if the award is inadequate. In *Dimick v. Schiedt*,[104] the Supreme Court held that additur would violate the Seventh Amendment. Dicta in *Gasperini* hints at the possible overrule of *Dimick*.[105]

In discussing the impact of the "materially deviates" standard on the federal court system, the Court expressly notes that the judge-made "shock the conscience" standard tempers the excessiveness of jury verdicts.[106] Every member of the Court agrees that the state standard imposes a greater constraint on the size of the verdicts than does the "shock the

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Torres v. Wendco of Puerto Rico, Inc., No. 95-1544, 1997 WL 135682, at *4 (D. Puerto Rico, Jan. 15, 1997), discussed more fully *infra* at text accompanying note 122. Will that rule apply or will the courts return to the *Swift* era and not respect the common law decision? Other examples abound. Assume that a state tort reform package provides that no jury verdict should be upset if the amount falls within the limits imposed by the Due Process Clause. Would such a flexible constitutional standard be binding in a federal court? Or suppose that the state statute provides that a new trial can never be granted on damages only even if it appears that the issue is distinct and separable from issues relating to liability. Will the state statute override the federal practice of permitting bifurcation? *See* McClain v. Owens-Corning Fiberglass Corp., 139 F.3d 1124 (7th Cir. 1998) (holding without analysis that federal law governs bifurcation). These examples underscore some of the difficult issues that will arise in attempting to balance federal and state interests and highlight the seeds of confusion sown by the *Gasperini* majority's rationale.

[103] *Gasperini*, 518 U.S. at 426.

[104] 293 U.S. 474 (1935).

[105] *Gasperini*, 518 U.S. at 433 n.16. The additur issue raises several questions. May a lower federal court, following the dicta in *Gasperini*, disregard *Dimick*, or must it await the overrule by the Supreme Court? If the federal courts cannot grant additur, should not the Supreme Court have inquired whether the remittitur portion of the statute should nevertheless be applied under a severability doctrine? Would New York precedents or legislative history have to be consulted to determine the effect of one provision in the statute being unenforceable? Or are these issues solely or primarily matters of federal law?

[106] *Id.* at 430-31.

conscience" standard.[107] As stated in the majority opinion, the deviates materially standard, "in design and operation, influences outcomes by tightening the range of tolerable awards."[108] Yet, in a later passage of the opinion, in discussing the relevance of *Byrd*,[109] the Court also notes with approval the "trial judge['s] . . . discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence."[110] Clearly a verdict that materially deviates from reasonable compensation does not comport with the weight of the evidence. Perhaps the seeds undermining the "shock the conscience" standard in the subset of excessive verdict adjudications had already been sown, although the seedlings remained dormant until watered by the New York legislature.

IV. AFTERMATH

On remand, the district court recognized that the *Gasperini* decision merely changes the standard by which jury verdicts should be reviewed and upon which remittitur should be based, but does not set forth the criteria for making the computation.[111] After citing New York cases according "great deference" to the "jury's interpretation" and acknowledging that "review should be done sparingly," the court followed federal pre-*Gasperini* decisions and fixed the standard as follows: The remitted amount should reduce the verdict only to the maximum that would be upheld by the trial court as not excessive.[112] After finding the $100,000 amount set by the Court of Appeals entitled to "little weight,"[113] the court concluded that the $375,000 represents the maximum award that a "jury could give without deviating materially from what would be reasonable compensation."[114]

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[107] *Id.* at 429.

[108] *Id.* at 425.

[109] At this point in the opinion, the Court notes that *Byrd* involved the first clause of the amendment, the Trial by Jury Clause, whereas the case under consideration involves the Reexamination Clause. One may wonder whether intruding on a jury trial (perhaps even disrespecting jury verdicts) might cause greater disparagement to the institution than taking an aspect of the case away from the jury and reposing it in the judge, as South Carolina did in *Byrd*.

[110] *Id.* (citing *Byrd*, 356 U.S. 525, 540 (1958)); *see also supra* text accompanying note 93.

[111] Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765 (S.D.N.Y. 1997), *rev'd on other grounds*, 149 F.3d 137 (2d Cir. 1998).

In future cases, if a state statute sets forth a standard other than "shock the conscience," a threshold question must be whether the state and federal standards differ. For example, in *Pescatore v. Pan American World Airways,*[115] the Second Circuit noted that Ohio's "denial of substantial justice" and "manifestly against the weight of the evidence" standards were similar to the federal "shock the conscience" standard, although without stating why the Ohio standard is not closer to the New York "materially deviates" test.[116] In *Steinke v. Beach Bungee, Inc.*,[117] the Fourth Circuit deferred to a South Carolina *com-*

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[112] *Gasperini*, 972 F. Supp. at 769. The court could have chosen from among several standards, including the following: the maximum amount that would not be found excessive, a reasonable amount, and the minimum amount that would be upheld as providing reasonable compensation. *See also* MOORE ET AL., *supra* note 79, ¶ 59.13[2]g (discussing standards for remittitur). *Compare* Powers v. Allstate Ins. Co., 102 N.W.2d 393 (Wis. 1960) (utilizing reasonable amount) *with* Heimlick v. Taylor, 102 N.W. 10 (Wis. 1905) (applying lowest amount). Should the district court have inquired into the manner in which New York state courts would have computed the sum? Or would such an inquiry be unduly burdensome for the administration of the federal judicial system?

As noted by the district court, the benefits of using the maximum amount standard are obvious: It is the most faithful to the jury verdict; moreover, the plaintiff is unlikely to reject the choice and opt for a new trial. *Gasperini*, 972 F. Supp. at 769.

Despite these benefits and the constraints of *Gasperini*, the Eighth Circuit found that an award of $350,000 "would be *reasonable* under Missouri law" as punitive damages and thus overturned as an abuse of discretion the district court's reduction of a $50,000,000 jury verdict to $5,000,000. *See* Kimzey v. Wal-Mart, 107 F.3d 568, 578 (8th Cir. 1997) (emphasis added).

[113] *Gasperini*, 972 F. Supp. at 772. The Second Circuit opinion was entitled to little weight for several practical reasons: The attorneys did not argue the issue of the amount, and the Second Circuit did not have the benefit of exhibits that were most critical in evaluating damages. *Id.*

[114] *Id.* at 773.

[115] 97 F.3d 1 (2d Cir. 1996).

[116] *Pescatore*, 97 F.3d at 18.

[117] 105 F.3d 192 (4th Cir. 1997).

mon-law standard that the trial judge has the duty to reduce the verdict by order nisi if the jury award is "over-liberal."[118]

Torres v. Wendco of Puerto Rico, Inc.[119] demonstrates another extreme position to which the pendulum has swung. In that case, the court applied the federal "shock the conscience" standard because there was no state statute setting forth a different standard.[120] Inexplicably, it held that in the absence of a state statute, no substantive laws govern the size of jury verdicts.[121] The court held that if no state statute governs the inquiry, the review of the size of the jury award is governed by federal law.[122]

As noted, many problems confront the judiciary respecting the reach of *Gasperini* in areas other than motions for new trial and damage awards.[123] Perhaps *Gasperini* will be limited to its peculiar facts and will not infect and confuse other areas. On the other hand, the courts may, in light of *Gasperini,* interpret the Federal Rules of Civil Procedure and federal statutes restrictively in order to avoid precipitating *Erie* problems and clashes with state policies.[124] This approach would be unfortunate and would undermine the federal judicial system as an independent body for the adjudication of rights.

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[118] *Steinke*, 105 F.3d at 197. It would appear that permitting a trial judge to reduce a jury's award and enter judgment in a reduced sum would violate the Seventh Amendment. Remittitur survives the Seventh Amendment inquiry because it gives the plaintiff the option to avoid a new trial by agreeing to reduce the award.

[119] No. 95-1544, 1997 WL 135682, at *1 (D. Puerto Rico, Jan. 15, 1997).

[120] *Torres*, 1997 WL 135682, at *4.

[121] *Id.* In a previous passage, the court cited a Puerto Rico decision holding that judgments may be reviewed when the award is "exaggeratedly high or ridiculously low." *Id.* This standard comports with the "shock the conscience" test.

It would appear that a federal court should respect a state common-law practice as part of the substantive law of the state, unless the federal courts are to return to the days of *Swift v. Tyson*, the era in which federal courts did not follow common-law precedents. Yet under *Byrd*, one may properly wonder whether the state practice would be considered "bound up with the rights and obligations of the parties." *See supra* text accompanying notes 25-26. What will happen after *Gasperini* is far from clear.

[122] *Torres*, 1997 WL 135682, at *4. The court seems to be resurrecting the now obsolete *Swift* doctrine distinguishing between state statutes and local laws on the one hand and judicial opinions on the other. In an unpublished opinion, the Fourth Circuit directed a district court to consider punitive damage awards in light of common-law principles found in South Carolina cases. *See* Martin v. Diamant Boart Am., Inc., No. 96-1414, 1997 WL 286123, at *3-*4 (4th Cir. May 30, 1997).

[123] The Supreme Court has never directly held that federal courts in diversity cases must apply the forum non conveniens rule of the state, *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981), and lower federal courts have fashioned federal common law. *See, e.g.*, Seguros Comerciales Am. S.A. de C.V. v. American President Lines, Ltd., 105 F.3d 198, 199 (5th Cir. 1996); 15 CHARLES

V. CONCLUSION

Whether and to what extent *Gasperini* has changed the analysis of which rule—state or federal—a federal court will apply when deciding a diversity case must await further explication by the Supreme Court. In the meantime, lower courts will wrestle with the breadth of the decision and in our opinion should, in areas other than new trial motions and excessiveness of damages, turn to *Hanna* as the beacon rather than to *Gasperini.* If the Court interprets other Rules as grudgingly as it has interpreted Rule 59, uniform application of the Federal Rules of Civil Procedure in the federal courts will be sacrificed.[125] Certainly, as *Hanna* suggests, more precise language in the Rules will make a difference. But putting the onus on the drafting of the Rules pays little respect to the principles underlying *Erie.* Perhaps the Court heeded Justice Harlan's

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ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828, at 293-94 (2d ed. 1986) (stating that forum non conveniens is matter of judicial administration). *Gasperini* should refocus the issue. It now seems clear that a contrary state rule might apply. There is no federal rule or statute directly on point, and use of a federal rule may encourage forum shopping or cause inequitable administration of the laws.

[124] The Court could impose a requirement that the rule or statute must be "unmistakably clear in the language of the statute [or Rule in question]." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (overriding states' Eleventh Amendment immunity from suit). But the imposition of this standard in those amorphous and differentiated *Erie* areas would cause considerable, and unnecessary, problems for drafters. *See generally* Betsy J. Grey, *Preemption of* Bivens *Claims: How Clearly Must Congress Speak?,* 70 WASH. U.L.Q. 1087 (1992).

[125] Recall that the Court granted the petition for certiorari in *Hanna* "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the [lower court's] decision." Hanna v. Plumer, 380 U.S. 460, 463 (1964).

admonition that *Hanna*'s "'arguably procedural, *ergo* constitutional' test moves too fast and far in the other direction."[126]

The fallout from *Gasperini* may make the Court appreciate and reexamine the deficiencies in *Hanna*'s formalistic insistence that a rule expressly and directly cover the issue under consideration. Such literalism does disservice to the aims of *Erie*. In determining the applicability of a federal rule, little attention should focus on whether the rule expressly embraces the issue on the one hand or incorporates a time-honored and uniform tradition on the other. The Court should have honored the federal "shock the conscience" standard for granting a new trial. But assuming that this standard truly implicates serious forum shopping and inequitable administration of the laws concerns—and is not mandated by the Seventh Amendment—then one could convincingly demonstrate that a rule directly providing such a standard should not be followed: either because of the substantive rights limitations of the Rules Enabling Act or more boldly because of *Erie* concerns.

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[126] *Id.* at 476 (Harlan, J., concurring).

SATISFYING THE DUTY TO MITIGATE IN EMPLOYMENT CASES: A SURVEY AND GUIDE

Richard J. Gonzalez[*]

Determining an appropriate rate and time period for the calculation of backpay in employment discrimination and wrongful discharge cases can be a challenge to the practitioner and the courts even without considerations of mitigation. The substantial body of law that has developed regarding mitigation renders the calculation even more troublesome because of the infinite number of variations among the ways in which terminated employees continue to live their lives. Some terminated employees search relentlessly but without success for any alternative employment, while others search diligently but only for virtually identical positions. Some may make only half-hearted attempts, perhaps because of damaged self-confidence or the lure of a temporary respite from the pressures of the working world. Others might search for a brief period of time and then decide to pursue some other avenue, such as additional schooling or starting their own businesses.

Yet when terminated employees stop searching for similar positions through traditional methods and attempt to put their futures in order through some other means, many of the stickiest mitigation problems arise. This article attempts to summarize the law regarding mitigation of damages and to provide practical guidance for building the mitigation cases of both employees and employers.

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I. BURDEN OF PROOF AND STANDARD OF REVIEW

The express language of Title VII makes clear that monies claimants earned or should have earned during the interim period must be deducted from the backpay award.[1] But the burden of proof on the mitigation issue belongs to the defendant, who must demonstrate that the plaintiff failed to exhibit reasonable diligence in the mitigation of damages.[2]

A. *Burden of Proof*

After the claimant presents evidence relating to damages, the burden of proof shifts to the defendant to establish either the claimant's failure to mitigate his damages or the amount of interim earnings that should be deducted from the backpay award.[3] The defendant must prove failure to mitigate by a preponderance of the evidence.[4] The defendant may satisfy its burden by proving that 1) there were substantially equivalent jobs available to the claimant and 2) claimant failed to exercise reasonable care and diligence in seeking such jobs.[5] It has been held reversible error for a court to exclude a defendant's expert testimony regarding the availability of jobs and the reasonableness of a claimant's mitigation efforts.[6] If the fact finder determines that the claimant failed to mitigate, the backpay award will be reduced by the amount the defendant proves the claimant could have earned.[7]

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[1] 42 U.S.C. § 2000e-5(g)(1) (1994).

[2] Sheehan v. Donlen Corp., 173 F.3d 1039, 1048 (7th Cir. 1999); NLRB v. Thalbo Corp., 171 F.3d 102, 112 (2d Cir. 1999).

[3] *See* Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 16 (1st Cir. 1999); Excel Corp. v. Bosley, 165 F.3d 635, 639 (8th Cir. 1999).

[4] *See, e.g.,* Rodriguez v. Taylor, 569 F.2d 1231, 1243 (3d Cir. 1977).

[5] *See* Booker v. Taylor Milk Co., Inc., 64 F.3d 860, 864 (3d Cir. 1995); Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1497 (9th Cir. 1995); Coleman v. Lane, 949 F. Supp. 604, 608 (N.D. Ill. 1996).

[6] Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1346 (9th Cir. 1987).

It should be noted that several circuits have carved out an exception to the general rule of how an employer can satisfy its burden of proof. These courts have held that where an employer can prove that the claimant made no reasonable effort to seek any kind of employment, the employer will be absolved from the burden of demonstrating that suitable employment was available to the claimant.[8] Cases are rare, however, where the claimant did absolutely nothing after the adverse employment decision. Most often the issue will focus on whether the claimant's actions were sufficient to satisfy his or her duty to mitigate.

B. *Standard of Review*

A trial court's findings of fact regarding mitigation are subject to the "clearly erroneous" standard of review.[9] Trial courts have broad discretion to fashion awards in Title VII cases so as to compensate fully a plaintiff in a manner that suits the specific facts of the case.[10] It should be noted that this standard differs somewhat from the standard of review for damage awards generally, which has been described as a "merger" of the abuse of discretion and clearly erroneous standards.[11] The Seventh Circuit, in *Hunter v. Allis-Chalmers Corp.*, held that the assessment of damages is a question of fact that will not be set aside unless clearly erroneous and the trial court has broad discretion to fashion relief to victims of employment discrimination in order to make them whole.[12] The court also held that a jury's award of damages will be set aside only if it is "grossly excessive."[13]

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[7] *See* Denesha v. Farmers Ins. Exch., 161 F.3d 491, 502 (8th Cir. 1998); *see also* Hopkins v. Price Waterhouse, 920 F.2d 967, 982 (D.C. Cir. 1990) (reducing backpay where claimant could, through reasonable mitigation efforts, have earned $100,000 per year, but only earned $50,000-$80,000 per year).

[8] *See, e.g., Quint*, 172 F.3d at 16; Greenway v. Buffalo-Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998); Weaver v. Casa Gallordo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991); Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990). *But see Booker*, 64 F.3d at 866 (requiring employer to demonstrate availability of subsequent equivalent jobs as well as absence of reasonable diligence by its former employee although employee remained idle following discharge); Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1044 (7th Cir. 1994).

[9] Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 623 (6th Cir. 1983).

[10] Selgas v. American Airlines, Inc., 104 F.3d 9, 12-13 (1st Cir. 1997).

[11] Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975).

The use of these strict standards of review for damage awards generally, and for findings related to mitigation in particular, underscore the need for trial attorneys to develop their damage cases to the fullest extent possible and with the same care and precision brought to their liability cases.

II. BASIC PRINCIPLES OF MITIGATION

A. *The General Mitigation Rule*

The courts have struggled with attempts to define the mitigation duty in the employment context, regardless of whether the claim arises by contract or tort. Title VII expressly imposes a duty upon claimants to use "reasonable diligence" to mitigate damages.[14] The duty to mitigate applies with equal force to claimants bringing actions under other federal discrimination statutes.[15] The Supreme Court, speaking in the failure-to-hire context, has declared that the duty to mitigate "requires the claimant to use reasonable diligence in finding other suitable employment."[16] Similarly, a discharged employee has the duty to exercise reasonable diligence in seeking substantially equivalent employment after being discriminatorily discharged from employment.[17]

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[12] Hunter v. Allis-Chalmers, 797 F.2d 1417, 1425 (7th Cir. 1986).

[13] *Hunter*, 797 F.2d at 1425.

[14] *See* 42 U.S.C. § 2000e-5(g)(1) (1994) (stating "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay" award).

[15] *See, e.g.*, NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 347-48 (1953) (remedies awarded pursuant to National Labor Relations Act must, with respect to backpay awards, take into consideration claimant's duty to mitigate damages); Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 935 (5th Cir. 1996) (holding injured party has duty under § 1981 to use reasonable diligence to attain substantially similar employment and, thereby, mitigate damages under Title VII); Bonura v. Chase Manhattan Bank, 629 F. Supp. 353, 356 (S.D.N.Y. 1986) (requiring age discrimination claimant to exercise reasonable diligence in seeking suitable alternative employment).

[16] Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

B. Defining the Reasonable Diligence Standard

Title VII expressly imposes a duty upon discrimination claimants to exercise reasonable diligence in the pursuit of interim earnings that can be off-set against economic losses in the nature of backpay.[18] Although not express in other federal employment discrimination statutes, courts have generally relied upon Title VII mitigation case law to hold other claimants to the same reasonable diligence standard.[19]

One of the most frequently cited federal cases regarding mitigation of damages is *Rasimas v. Michigan Department of Mental Health*.[20] The Sixth Circuit in *Rasimas* defined "reasonable diligence" as imposing a duty upon claimants to "make reasonable efforts to mitigate,"[21] while holding that the burden on the claimant "is not onerous," nor does it "require him to be successful in mitigation."[22] Similarly, the First Circuit has ruled that a claimant's duty to mitigate requires an "honest, good faith effort" and the claimant is held "only to reasonable exertions in this regard, not the highest standard of diligence."[23]

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[17] *Ford Motor Co.*, 458 U.S. at 231. *See also* Hopkins v. Price Waterhouse, 920 F.2d 967, 981-82 (D.C. Cir. 1990); Ensor v. Painter, 661 F. Supp. 21, 24 (E.D. Tenn. 1987).

[18] 42 U.S.C. § 2000(a), et. seq.; *Ford Motor Co.*, 458 U.S. at 231 n.14 (utilizing reasonable diligence standard for ADEA claims).

[19] *See Patterson*, 90 F.3d at 935 (applying reasonable diligence standard in employment discrimination suit); Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983) (utilizing reasonable diligence standard for ADEA claims); *Bonura*, 629 F. Supp. at 356 (ADEA); *but see* Moore v. McDermott, Inc., 504 So. 2d 982, 983 (La. Ct. App. 1987) (holding preponderance of evidence standard should be used in worker's compensation claim).

[20] 714 F.2d 614 (6th Cir. 1983).

[21] *Rasimas*, 714 F.2d at 624.

[22] *Id.* (citing United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 938 (10th Cir. 1979)). *See* Hawkins v. 1115 Legal Servs. Care, 163 F.3d 684, 695 (2d Cir. 1998); NLRB v. Pilot Freight Carriers, Inc., 604 F.2d 375, 377 (5th Cir. 1979); *see also* Hanna v. American Motors Corp., 724 F.2d 1300, 1310 (7th Cir. 1984); *Shell Oil*, 702 F.2d at 202; DiSalvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978).

Not all terminated employees meet the reasonable diligence standard continually throughout their period of unemployment. A claimant who initially exercises reasonable diligence but then reduces his or her efforts after an initial lack of success may not meet the duty to mitigate.[24] In *Payne v. Security Savings & Loan Ass'n.*,[25] the Seventh Circuit held that an ADEA claimant's backpay award was properly reduced for failure to mitigate.[26] The claimant engaged in an "earnest and extensive" job search during the first year of unemployment, but the effort gradually diminished and ceased because of a lack of success.[27] The court held that the claimant's discouragement was understandable and his lack of success regrettable, but his duty to mitigate "did not evaporate in the face of . . . difficulties."[28]

Conversely, a claimant who fails to exercise reasonable diligence immediately following a discriminatory act may be able to re-establish the accrual of backpay as of a subsequent date by showing reasonable efforts to secure employment after the period of inactivity.[29] In *Jackson v. City of Akron*,[30] the claimant failed to make what were deemed adequate efforts to mitigate damages until two years after the discriminatory discharge.[31] The court tolled the backpay period for the two-year period subsequent to the discharge, then started the backpay period as of the date when the evidence showed that the claimant began searching for a job in earnest.[32]

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[23] NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 422-23 (1st Cir. 1968).

[24] *See, e.g.*, Payne v. Security Sav. & Loan Assoc., 924 F.2d 109, 109-10 (7th Cir. 1991); Sennello v. Reserve Life Ins. Co., 667 F. Supp. 1498, 1518-19 (S.D. Fla. 1987).

[25] *Payne*, 924 F.2d at 109.

[26] *Id.* at 110.

[27] *Id.* at 111.

[28] *Id.*

[29] *See* Jackson v. City of Akron, 411 F. Supp. 680, 689 (N.D. Ohio 1976); *cf.* Jacobson v. Pitman-Moore, Inc., 582 F. Supp. 169, 178 (D. Minn. 1984) (finding claimant's use of three weeks of accrued vacation time before beginning job search reasonable).

[30] *Jackson*, 411 F. Supp. at 680.

[31] *Id.* at 686-87.

1. *Evidence of a Claimant's Reasonable Diligence*

The use of the term "reasonable" in defining the claimant's duty to mitigate seems to require that the fact finder evaluate claimant's job search efforts under an objective standard. However, the courts have imposed a quasi-subjective standard by requiring that the fact finder evaluate the "reasonableness" of claimant's effort "in light of the individual characteristics of the claimant and the job market."[33] Thus, in *Hunter v. Allis-Chalmers Corp.*, the Seventh Circuit found that a young, skilled laborer living in a large city (Chicago) with numerous job opportunities should have been able to find a job within five years had he exercised reasonable diligence.[34] In *Hanna v. American Motors Corp.*, however, the same court held that an unskilled laborer seeking work in a smaller community had exercised reasonable diligence based upon the dramatically fewer employment opportunities there available.[35]

This quasi-subjective standard has led courts to regard as relevant evidence, and to closely examine, the unique factual circumstances of particular cases in order to gauge the reasonableness of a claimant's effort to mitigate. Some courts look to whether the claimant checked want ads, registered with employment agencies, or discussed job opportunities with friends.[36] However, a claimant's failure to utilize, or his or her under-utilization of more than one of these sources, may lead to a finding that the duty to mitigate has not been satisfied. For example, in *Sellers v. Delgado College*, the Fifth Circuit held that the district court's finding that the claimant had failed to mitigate was adequately supported by evidence that the claimant failed to submit more than two job applications per month and that the claimant's rate of response to a substantial number of relevant want ads was minimal.[37]

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[32] *Id.* at 690.

[33] Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983). *See* Sellers v. Delgado College, 902 F.2d 1189, 1193 (5th Cir. 1990); *see* James L. Hughes et al., *Backpay in Employment Discrimination Cases*, 35 VAND. L. REV. 893, 1018 (1982) (stating court must look at efforts of claimants to mitigate on individual basis in class action suits).

[34] *Hunter*, 797 F.2d at 1428.

[35] *Hanna*, 724 F.2d at 1306.

[36] *See* Sprogis v. United Airlines, Inc., 517 F.2d 387, 392 (7th Cir. 1975) (concluding reasonable claimant "seeking employment would take all these steps if . . . sincere about obtaining employment").

The age of the claimant may also be a factor in evaluating the reasonableness of the mitigation effort. Although ADEA certainly does not provide nor suggest that older plaintiffs have a significantly lessened mitigation burden, the courts have recognized what employment lawyers instinctively know: that a plaintiff terminated in his or her fifties or older will experience far greater problems in securing comparable employment than will a younger applicant, ADEA notwithstanding. Thus, it is not uncommon for courts to hold older claimants to a lesser duty.[38] However, even an older claimant is expected to put forth some effort designed to secure comparable work.[39] In *Johnston v. Harris County Flood Control District*,[40] the Fifth Circuit held that a 59-year-old man with heart disease, emphysema, one lung, blindness in one eye, and little education failed to mitigate damages because he ended his job search after a short period of time.[41] Despite the claimant's testimony that he felt that continuing his search would be futile, especially after one employer bluntly told him that he would not be hired because of his poor eyesight and lack of education, the court remanded to reduce the awarded backpay, reflecting another unwritten principle that employment lawyers understand.[42] Courts do not like to feel as though parties have gained windfalls, and it is likely that there is an unspoken element of perceived unfairness in forcing a discriminatory employer to pay backpay for a lengthy time period merely because other potential employers may discriminate against older applicants.

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[37] *Sellers*, 902 F.2d at 1189. *See also* Helbling v. Unclaimed Salvage and Freight Co., Inc., 489 F. Supp. 956, 964 (E.D. Pa. 1980) (claimant failed to exercise reasonable diligence by limiting her search to jobs for which she was marginally qualified); *cf.* Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 950 (D. Colo. 1979) (holding claimant exercised reasonable diligence in that she searched for reemployment in same manner as she initially sought employment).

[38] *See* Orzel v. Wauwatosa Fire Dept., 697 F.2d 743, 757 (7th Cir. 1983) (holding "less than vigorous" job search by 55-year-old man to be sufficient mitigation); Fall Stamping & Welding Co. v. International Union United Auto., Aircraft & Agric. Implement Workers of Am., 485 F. Supp 1097, 1101 (N.D. Ohio 1979).

[39] *See* Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579 (5th Cir. 1989) (reducing backpay award where claimant did no job search after being injured); Johnson v. Chapel Hill Indep. Sch. Dist., 853 F.2d 375, 383 (5th Cir. 1988) (finding 57-year-old claimant failed to exercise reasonable diligence based upon her teaching qualifications and experience when she took no-salary position at her family's grocery store).

[40] 869 F.2d 1265 (5th Cir. 1989).

2. *Documenting Reasonable Diligence*

Courts frequently express frustration over a lack of evidence within the record on some aspect of mitigation of damages. It is clear by studying case law that courts tend to reward parties who can provide any documentation of the mitigation-related claims that they raise.

Standard advice to any potential employment plaintiff should be to begin to keep a record of all mitigation-related activities in which he or she engages. Advise such clients at the initial contact, even if they have yet to make the determination of whether to bring a suit. Often, several months have already passed between the date of a discharge and the date that an attorney is consulted, and job search activities that have been engaged in thus far will rapidly fade from memory if not recorded.

In addition, encourage clients to think expansively about what it means to conduct a job search. Many clients will naturally not bother to make a record of anything less than a traditional application for employment or invitation to interview. But a plaintiff can bolster his or her mitigation case immeasurably by maintaining some record of every job search activity. Such a record can include preparing resumes and cover letters, reading want ads, making phone calls to prospective employers, holding conversations with friends and business contacts about their job searches, consulting books and other search technique guidance, and merely thinking about and planning job search strategies.

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[41] *Johnston*, 869 F.2d at 1579.

[42] *Id.*

The format used is not as important as the practice of saving and recording everything. Even messy, disorganized collections of want ads and phone message slips can be effective evidence. Some plaintiff's attorneys provide their clients with journals and examples of mitigation logs kept by former clients (with their permission, of course) as guides, in order to encourage the best and most manageable of possible presentations. A resultant benefit to the attorney is that it will be far less time consuming to respond to discovery requests for evidence of the plaintiff's mitigation efforts if the information exists in an easily-retrievable form.

3. *Reasonable Diligence in Failure-To-Promote Cases*

Mitigation of damages also applies in failure-to-promote cases where the claimant still holds his or her job after the discriminatory act.[43] In these cases, it is likely that a passed-over plaintiff will be deemed not to need to go to any further effort, such as applying for other promotions or searching for a comparable position elsewhere, in order to meet the burden of mitigation since he or she will still be earning wages that will be offset against any backpay award. Yet if the employee voluntarily terminates his or her position because of disappointment over the lost promotion, the courts have held that, absent a constructive discharge, the employee has failed to mitigate.[44] Further, a claimant in a failure-to-promote case has a duty to mitigate damages by accepting an offer of promotion while a claim is pending.[45] This will be so even where the offer does not include backpay.[46]

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[43] Badeen v. Burns Int'l Sec. Servs., Inc., 765 F. Supp. 341, 348-49 (E.D. Tex. 1991).

[44] *Badeen*, 765 F. Supp. at 348-49.

[45] Babrocky v. Jewel Food Co., 773 F.2d 857, 868 (7th Cir. 1985). *See*

Courts have, however, recognized situations where it may be reasonable for a claimant to quit and seek alternative employment. This is more likely to be an issue in a case involving the employee who is discriminatorily denied a promotion that is not necessarily a logical next step in the employee's career path. For example, the Ninth Circuit in *Thorne v. City of El Segundo* and *Odima v. Westin Tucson Hotel* has held that where an unlawfully denied position is "materially different" from that currently held, a plaintiff may, consistent with her burden to mitigate, quit and begin to pursue similar positions elsewhere rather than continue in the inferior job.[47] In *Thorne*, a clerk/typist for a police department was discriminatorily denied a position as a police trainee and then quit her clerical position with the police department.[48] The employer argued that Thorne failed to mitigate reasonably her damages when she resigned her position and that, since the resignation could not be regarded as a constructive discharge, a significant deduction from awardable backpay was appropriate. The court treated the case as a refusal to hire rather than a failure-to-promote case. The court reasoned:

> Thorne was preparing to enter an entirely different career, in competition with other applicants outside the police department who also wished to become police officers. The mere fortuity that Thorne had a pre-existing employment relationship with the employer who was then hiring police officers does not bring her case within the scope of promotion or demotion cases that apply the doctrine of constructive discharge.[49]

Stallings v. Container Corp. of Am., 75 F.R.D. 511, 522-23 (D. Del. 1977).

[46] *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 238 (1982) (holding that failing to accept offer of employment even though no backpay is offered does not absolve claimant of duty to accept offer).

[47] Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1495-96 (9th Cir. 1994); Thorne v. City of El Segundo, 802 F.2d 1131, 1134-35 (9th Cir. 1986).

[48] *Thorne*, 802 F.2d at 1133.

[49] *Id.* at 1134.

Similarly, in *Odima*, the plaintiff unsuccessfully tried six times to transfer from his position in the Laundry to the Accounting Department.[50] Finding that the plaintiff was attempting to enter "an entirely different career," the Ninth Circuit followed its Title VII decision in *Thorne* in this § 1981 context to characterize again the employment decision as a refusal to hire.[51] Thus, the employees' voluntary terminations did not serve to limit their former employer's backpay liability.[52]

C. Defining Substantially Equivalent Employment

The claimant in an employment discrimination or wrongful discharge case has the duty to mitigate damages by exercising reasonable diligence in seeking "substantially equivalent employment."[53] Assuming that a terminated employee has passed the initial hurdle of demonstrating adequate job-seeking efforts in the abstract, in terms of quantity of effort, but still is not employed, the issue often becomes whether he or she has indeed diligently searched for and not failed to accept substantially equivalent employment.

1. The General Rule

The courts have tried to define substantially equivalent employment primarily by attempting to define what it is not. In the leading case on the subject, *Ford Motor Co. v. EEOC*, the Supreme Court observed that in order to demonstrate adequate mitigation efforts, a claimant "need not go into another line of work, accept a demotion, or take a demeaning position."[54] Further, a claimant need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position."[55]

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[50] *Odima*, 53 F.3d at 1488.

[51] *Id.* at 1496.

[52] *Thorne*, 802 F.2d at 1134; *Odima*, 53 F.3d 1495-96. *See also* Whatley v. Skaggs Co., Inc., 707 F.2d 1129, 1138 (10th Cir. 1983) (awarding plaintiff backpay for period subsequent to date of plaintiff's resignation).

[53] Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983); Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989).

[54] Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

In *Rasimas*, the Sixth Circuit arrived at a definition highly favorable to plaintiffs.[56] In order to constitute substantially equivalent employment, the job "must afford the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status."[57] In *Rasimas*, the claimant was a former supervisor at the Michigan Department of Mental Health (MDMH) who brought a Title VII claim against MDMH alleging that he was dismissed because of his sex.[58] The claimant was originally hired as a recreation aide and was later promoted to the supervisory position from which he was discharged.[59]

MDMH attempted to show that the claimant failed to mitigate damages because he refused an offer from MDMH to interview for a position as a recreation aide, for which, had he been hired, he would have received wages during the backpay period that would have significantly lessened his awardable damages. MDMH further argued that the recreation aide position was substantially equivalent to the claimant's prior supervisory position. The Sixth Circuit found that the recreation aide position was not substantially equivalent to the supervisory position.[60] The court held that the two positions were not "co-extensive" because of such factors as lesser compensation and lower status and prestige and that MDMH's interview offer was "little more than an attempt to get [claimant] to accept a demotion."[61]

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[55] NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1320-21 (D.C. Cir. 1972).

[56] *Rasimas*, 714 F.2d at 614.

[57] *Id. See* Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1528 (11th Cir. 1991) (holding that management-trainee position was not "virtually identical" to operations manager position); Sellers v. Delgado College, 902 F.2d 1189, 1195 (5th Cir. 1990) (stating that former community college public relations officer failed to pursue substantially equivalent employment when she was not qualified for many jobs she applied for); Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989) (noting university professor not required to take high school teaching position), *overruled on other grounds by* Minority Employees of the Tenn. Dep't of Employment Sec., Inc. v. Tennessee Dep't of Employment Sec., 901 F.2d 1327 (6th Cir. 1990); *see also* Hanna v. American Motors Corp., 724 F.2d 1300, 1309 (7th Cir. 1984) (holding that discharged unskilled laborer met duty to mitigate by filing applications at similar factories in area); Jackson v. Shell Oil Co., 702 F.2d 197, 202 (9th Cir. 1983) (stating that former sales representative not required to take entry-level positions); McCann Steel Co., Inc. v. NLRB, 570 F.2d 652, 655 (6th Cir. 1978) (noting that "substantially equivalent employment refers to the hours worked . . . as well as [to] the nature of the work").

[58] *Rasimas*, 714 F.2d at 617.

[59] *Id.*

After *Ford Motor Co.* and *Rasimas*, it is clear that a plaintiff will be deemed to have failed to make reasonable efforts to mitigate, assuming adequate effort overall, only where he or she declines to pursue positions that are exceedingly similar to the position from which the discharge occurred.[62]

2. *Effect of Declining Offer of Instatement or Reinstatement*

A rather obvious but important preliminary inquiry regarding offers of instatement or reinstatement is whether the communication is, in fact, an offer. An offer to "submit an application" on behalf of the claimant[63] or statements that the employer is "willing to interview" or "willing to offer the opportunity to apply"[64] are not offers of employment. The employer's backpay liability will only toll if the offer is also for substantially equivalent employment then available to the claimant.[65] It is not enough that the claimant subjectively believed a position to be offered if no position was objectively available.[66]

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[60] *Id.* at 625. *Accord* Floca v. Homecare Health Serv., Inc., 845 F.2d 108, 112 (5th Cir. 1988) (holding job as registered nurse not substantially equivalent to job as Director of Nursing).

[61] *Rasimas*, 714 F.2d at 617.

[62] *See* United States v. City of Chicago, 853 F.2d 572, 578 (7th Cir. 1988) (stating that claimant was justified in leaving city purchasing department because job was not substantially equivalent to that of police officer); Brady v. Thurston Motor Lines, 753 F.2d 1269, 1273 (4th Cir. 1984) (affirming rule that claimant forfeits right to backpay by refusing substantially equivalent employment).

[63] Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 879 (11th Cir. 1986).

[64] Lesko v. Clark Publ'g Serv., 904 F. Supp. 415, 421 (M.D. Pa. 1995).

[65] *Lesko*, 904 F. Supp. at 421 n.4.

[66] *Id.*

a. Unconditional Offer

Perhaps the easiest determination of what qualifies as substantially equivalent employment arises when the job declined by the plaintiff is the very position about which the plaintiff is claiming a discriminatory failure to hire, as in *Ford Motor Co.*[67] The claimants there were three women who alleged a discriminatory refusal to hire.[68] Prior to trial, Ford offered two of the plaintiffs the very positions that they had previously been denied.[69] Although the offers were made without retroactive seniority, they were not conditioned upon claimants forfeiting their Title VII claims, but merely constituted a good-faith attempt to minimize any potential backpay award.[70]

The Supreme Court held that, as a matter of public policy, it was desirable to encourage defendants to comply voluntarily with Title VII by making unconditional job offers to claimants.[71] Therefore, a rule which tolls the accrual of backpay liability if "the defendant [unconditionally] offers the claimant the job originally sought" furthers the goal of ending employment discrimination through voluntary compliance.[72] The Court concluded that "absent special circumstances"[73] backpay liability will toll from the time a claimant unreasonably rejects an unconditional offer of the job originally sought.[74]

Although *Ford Motor Co.* was a failure-to-hire case, its principle clearly extends to termination cases, presenting defense attorneys and employers with an interesting dilemma. Plaintiff's attorneys know anecdotally that their clients, after having experienced an often traumatic termination, preceded by all manner of unpleasantries, seldom truly desire reinstatement into a prior position where they would be forced to work under the supervision of decision makers with whom they have a history of conflict. Defense attorneys know that their clients seldom favor the perceived loss of face involved in allowing a terminated employee to return triumphantly to the work place sending the clear message to all other employees that termination decisions are not necessarily final and that terminated employees who sue the company are likely to be awarded with reinstatement.

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[67] Ford Motor Co. v. EEOC, 458 U.S. 219, 222 (1982).

[68] *Ford Motor Co.*, 458 U.S. at 222-23.

[69] *Id.* at 222.

[70] *Id.*

[71] *Id.* at 228.

[72] *Id.* at 228-29.

[73] *Id.* at 238.

[74] *Id.* at 239 (citing Reliance Clay Prod. Co., 105 N.L.R.B. 135, 137 (1953) (noting backpay tolled where discriminatorily discharged employee refused unconditional reinstatement offer)).

Yet, where a defendant makes the unconditional reinstatement offer and the plaintiff declines, a serious and usually insurmountable blow has been dealt to the plaintiff's damages case. At worst, from the defense perspective, the plaintiff accepts the offer and mitigates his or her damages. Given the right set of facts and willing clients the unconditional reinstatement offer can be an effective and unexpected tool in the undoing of a plaintiff's damages case.

One area where a discharged plaintiff may generally safely decline an unconditional offer of substantially equivalent employment is where the work environment is likely—because of a history of sexual harassment or for other reasons—to be hostile.[75] Thus, where an employer fails to take adequate steps to improve the work environment that led to a plaintiff's constructive discharge, it is regarded as reasonable for the plaintiff to reject an offer of reinstatement.[76] However, if an offer of reinstatement is accompanied by a "credible" promise to end the harassment, plaintiff's rejection of the offer may be unreasonable.[77]

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[75] Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986) (stating award of front pay appropriate when reinstatement inappropriate due to excessive hostility or antagonism). *See* McNeil v. Economics Lab., Inc., 800 F.2d 111, 118 (7th Cir. 1986) (holding plaintiff need not request reinstatement as prerequisite to recovering front pay when reinstatement would be inappropriate), *overruled on other grounds by* Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988); EEOC v. Pacific Press Publ'g Ass'n, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979) (stating that when effective employment relationship cannot be reestablished, front pay is appropriate).

[76] Maturo v. National Graphics, Inc., 722 F. Supp. 916, 927 (D. Conn. 1989) (requirement that claimant in sexual harassment case accept reinstatement would be "not only inequitable, but cruel").

b. Conditional Offer

The basic rule that an offer of instatement or reinstatement will toll the accrual of backpay will not automatically hold true where the offer is conditional in any significant respect. For example, in *Toledo v. Nobel-Sysco, Inc.*,[78] the claimant was denied employment and brought a Title VII claim alleging religious discrimination.[79] The defendant argued that backpay should toll from the time that defendant subsequently offered the claimant the applied-for employment.[80] The Tenth Circuit, while acknowledging the general rule that a reinstatement offer will toll the accrual of backpay, found that the employer's offer was conditioned upon the claimant dropping the Title VII claim, taking a polygraph, and successfully passing a physical examination.[81] The court held that an offer based upon such conditions does not toll backpay, and the claimant's rejection of the offer was deemed to be reasonable.[82]

However, the courts have not gone so far as to hold that *any* condition attached to an instatement or reinstatement offer shall not toll the accrual of backpay. An offer subject to reasonable conditions may be adequate to bring into play the general rule that backpay will be tolled upon the employer offering reinstatement.[83] In *Morvay v. Maghielse Tool & Die Co.*,[84] the defendant's subsequent offer of employment required that the plaintiff first undergo and satisfactorily complete a psychiatric evaluation.[85] The Sixth Circuit found this condition to be reasonable in light of the claimant's history of exaggerated and unjustified fears and tolled the accrual of backpay from the time that the claimant rejected the conditional offer.[86]

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[77] Morris v. American Nat'l Can Corp., 952 F.2d 200, 203 (8th Cir. 1991) (holding that job offered was not demeaning and was consonant with claimant's skills).

[78] 892 F.2d 1481 (10th Cir. 1989).

[79] *Toledo*, 892 F.2d at 1485. The claimant subsequently amended his complaint to charge discrimination based on race as well as and national origin. *Id.*

[80] *Id.* at 1492-93.

[81] *Id.* at 1493.

[82] *Id.* at 1488-89. *See* Odima v. Westin Tuscon Hotel, 53 F.3d 1484, 1496-97 (9th Cir. 1995) (refusing to accept job offer expressly conditioned upon relinquishment of any and all discrimination claims, including right to pursue remedies in court, does not constitute failure to mitigate); *see also* Ford Motor Co. v. EEOC, 458 U.S. 219, 232 n.18 (1982) (holding unemployment claimants need not go into another line of work, accept demotion, or take demeaning position in order to mitigate).

[83] *See* Morvay v. Maghielse Tool & Die Co., 708 F.2d 229 (6th Cir. 1983); *see*

The plaintiff's attorney who is confronted with the dilemma of an unconditional reinstatement offer that his or her client does not want to accept can yet look for a basis upon which to argue that the offer, unconditional as it is, should not halt the backpay period. It is worthwhile to search for and highlight any material or even not-so-material distinctions in the terms and conditions of employment offered and to utilize the highly favorable case law, such as that discussed in the following section, concerning the declining of offers that arise through an external job search.

3. *Exceptions to Claimant's Duty To Accept Otherwise Substantially Equivalent Employment*

Although a claimant must take reasonable steps to mitigate, he or she need not accept a job that is not substantially equivalent to the previously held position.[87] The job offered must carry terms and conditions of employment that are similar to those of the job from which the claimant was discharged

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also Giandonta v. Syborn Corp., 804 F.2d 120, 124 (10th Cir. 1986) (holding that employee's refusal to accept reinstatement offer because he did not want to work under same person and reinstatement offer contained too many uncertainties was not sufficient to justify rejection of offer).

[84] 708 F.2d 229 (6th Cir. 1983).

[85] *Morvay*, 708 F.2d at 231.

[86] *Id.* at 232.

[87] *See Ford Motor Co.*, 458 U.S. at 231-32; Hybert v. Hearst Corp., 900 F.2d 1050, 1054 (7th Cir. 1990); Wonder Markets, Inc., 236 N.L.R.B. 787, 787 (1978), *enforced*, NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 676 (1st Cir. 1979) (claimant need not accept offer of reinstatement for different job when former position is still available); Good Foods Mfg. & Processing Corp., 195 N.L.R.B. 418, 419 (1972), *enforced*, NLRB v. Local 1445, Retail Clerks Int'l Ass'n, 492 F.2d 1302, 1306 (7th Cir. 1974) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits).

or unlawfully denied.[88]

a. Geographic Location

Offers of positions that are located an unreasonable distance from a claimant's residence may be rejected as not being substantially equivalent to the position about which discrimination or wrongful discharge is claimed.[89] In *NLRB v. Madison Courier, Inc.*,[90] a case cited approvingly by the Sixth Circuit in *Rasimas*, the court held that plaintiffs were not, in order to mitigate their damages, required to accept work in an area located over fifty miles from their homes "due to the excessive commute such jobs would have entailed."[91] Additionally, in *NLRB v. Westin Hotel*, the Sixth Circuit held that a claimant's failure to apply for jobs located only twenty-five miles away was reasonable where the evidence showed that the claimant's car was not reliable and the claimant lacked the money for necessary repairs.[92]

However, if relocation is common in the claimant's line of work,[93] or the claimant has shown a willingness to relocate in the past,[94] rejection of otherwise substantially equivalent employment may be held to constitute a failure to mitigate. *Ford*

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[88] Badeen v. Burns Int'l Sec. Serv., Inc., 765 F. Supp. 341, 349 (E.D. Tex. 1991).

[89] Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 625 (6th Cir. 1983) (holding claimant's refusal to interview for job located 223 miles from his home reasonable) (citing NLRB v. Madison Courier, 472 F.2d 1307, 1314 (D.C. Cir. 1972) and Oman Constr. Co., Inc., 144 N.L.R.B. 1534 (1963), *enforced*, 338 F.2d 125 (6th Cir. 1964)). *See also* Lee v. Monroe County Bd. of Educ., 640 F.2d 755, 759 (5th Cir. 1981) (holding school superintendent's failure to seek job in adjacent counties was not failure to mitigate); Daniels v. City of Alcon, 732 F. Supp. 1467, 1477 (E.D. Tenn. 1989) (holding claimant not required to travel unreasonable distance to seek equivalent employment).

[90] 472 F.2d 1307 (D.C. Cir. 1972).

[91] *Madison Courier*, 472 F.2d at 1314.

[92] NLRB v. Westin Hotel, 758 F.2d 1126, 1130 (6th Cir. 1985).

[93] *See* Real v. Continental Group, Inc., 627 F. Supp. 434, 448 (N.D. Cal. 1986); Cowan v. Standard Brands, 572 F. Supp. 1576, 1581-82 (N.D. Ala. 1983) (stating that comparable job in another city should suffice for employee who has moved several times in his career).

[94] *See* Ford v. Nicks, 866 F.2d 865, 874-75 (6th Cir. 1989).

v. Nicks involved the discriminatory denial of employment to a female professor whose husband was employed by the institution in question.[95] The couple had, in the past, conducted a nationwide job search for academic employment and had hoped to secure positions at the same institution or, at least, near to one another. The Sixth Circuit held that it was unreasonable for the plaintiff to turn down a highly comparable job, located seventy miles from the defendant, where she and her spouse had previously manifested an intention to search for work on a nationwide basis.[96] The court reasoned that, in view of the realities of this particular job market and based upon the couple's own history of declared flexibility, reasonable mitigation would have required plaintiff to accept the comparable position, inasmuch as the couple could reasonably have relocated to a point equidistant between the two cities.[97]

It is not difficult for employment attorneys to imagine numerous occupations where courts might be inclined to apply a similar analysis based either upon scarcity of openings or upon the specialized nature of the position itself. It is therefore worthwhile to consider whether the nature of the position at issue justifies a departure from the ordinary rules that adequate mitigation efforts do not require a willingness to relocate.

b. *History of Sexual or Other Harassment*

The emotional state of a sexual harassment victim may also serve as an acceptable reason to limit the duty to seek equivalent employment. In *Lathem v. Department of Children and Youth Services*, the Eleventh Circuit upheld a backpay award upon holding that where a defendant's sexual harassment and discriminatory conduct resulted in a disability that prevented the plaintiff from obtaining other employment, the reasonable diligence requirement does not apply.[98] Similarly, in *EEOC v. Gurnee Inn Corp.*,[99] the Seventh Circuit excused the failure of two sexual harassment victims who had been constructively discharged from vigorously seeking equivalent employment.[100] The court upheld the district court's finding that, because of their experiences during their subsequent employment, the claimants would feel "gun shy" about seeking equivalent employment.[101] In addition, at least one court has held that a claimant who has voluntarily left subsequent jobs—because of depression and emotional debilitation that could be proximately linked to harassment undergone while employed by defendant—will not have her backpay reduced.[102]

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[95] 866 F.2d 865 (6th Cir. 1989).

[96] *Nicks*, 866 F.2d at 874.

[97] *Id.*

[98] Lathem v. Department of Children & Youth Servs., 172 F.3d 786 (11th Cir. 1999).

4. *Lowered Sights Doctrine*

Although courts generally will not charge a terminated plaintiff with an unreasonable failure to mitigate where he or she searches exclusively for virtually identical employment, a court's period of deference toward the plaintiff's selectivity is not indefinite. Many courts have found that after a certain amount of time, claimants are expected to "lower their sights" and seek employment that they may have regarded earlier in their searches (and quite possibly still do regard) as inferior in nature.[103]

Although a claimant need not go to "heroic lengths" in seeking substantially equivalent employment,[104] a point may arise at which, even in the midst of the most diligent of narrow searches, the indefinite continuation of such a restricted search may be futile. When that occurs, a claimant must consider accepting suitable, lower paying employment to satisfy the duty to mitigate.[105] For example, in *Lampley v. Big Discount Food*

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[99] 914 F.2d 815 (7th Cir. 1990).

[100] *Gurnee Inn Corp.*, 914 F.2d at 818-19.

[101] *Id.* at 819.

[102] Maturo v. National Graphics, Inc., 722 F. Supp. 916, 926 (D. Conn. 1989).

[103] Hughes, *supra* note 33, at 1021-24.

[104] *E.g.*, Ford v. Nicks, 866 F.2d 865, 873 (6th Cir. 1989).

[105] *See* Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1045 (7th Cir. 1994) (stating "a plaintiff must adjust her notion of comparable employment after

Store, Inc.,[106] the claimant was a former meat-market manager whom the court held was initially justified in seeking only a similar job. However, the court ruled that as the period of unemployment increased, the claimant should have lowered her sights and taken a minimum wage job. Therefore, her backpay was reduced by the amount claimant could have earned at minimum wage.[107]

Courts have, however, carved out certain exceptions to the lowered sights doctrine, as well as safeguards to protect against its potentially harsh consequences. Claimants with unique qualifications or reputations may not need to lower their sights.[108] In addition, claimants who do lower their sights and as a result accept a lower-paying job need not stay in that job indefinitely in order to meet their mitigation burden if they quit in order to pursue reasonable alternatives.[109]

Moreover, the courts have been sensitive to the "damned if you do, damned if you don't" dilemma that befalls plaintiffs who lower their sights. Enterprising employment defense attorneys who attack a plaintiff for stubbornly failing to seek any but identical alternative employment are just as likely to attack the plaintiff who does so on the grounds that he or she has abandoned the prior field. Therefore, they commonly argue, backpay should not be computed at the rate of a position in the plaintiff's original field of work. But claimants who accept a job in another field in order to "make ends meet" will generally not

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extended unsuccessful job searches"); Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 411 (7th Cir. 1989) (finding duty to mitigate met where claimant accepted part time work and continued to search for substantially equivalent employment); Walters v. City of Atlanta, 803 F.2d 1135, 1145 (11th Cir. 1986) (holding claimant not initially required to seek work outside of chosen field, but once claimant decides that no other job in field is suitable claimant must seek work outside of field).

[106] 687 F. Supp. 211 (M.D.N.C. 1988).

[107] *Lampley*, 687 F. Supp. at 217.

[108] *See* EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 925-26 (S.D.N.Y. 1976) (finding exception to lowered sights doctrine where claimant's expertise was limited to pharmaceutical advertising).

[109] *See* United States v. City of Chicago, 853 F.2d 572, 579 (7th Cir. 1988); Sellers v. Delgado College, 839 F.2d 1132, 1137 n.2. (5th Cir. 1988); Maturo v. National Graphics, Inc., 722 F. Supp. 916, 928 (D. Conn. 1989).

be regarded as having permanently abandoned their primary occupations, so as to justify backpay accrual at a lower rate, or cease its accrual altogether.[110] The only basis upon which abandonment can be found is where the defense can make a showing that plaintiff's initial period of searching for comparable employment failed in one or more respects to constitute reasonable diligence, such that the ceasing of that effort at the time that it occurred was premature or otherwise unreasonable.[111]

III. PROBLEMS IN ASSESSING REASONABLE DILIGENCE

As set forth above, an employee discharged as a result of discrimination has an obligation to mitigate her damages by using reasonable diligence in finding substantially similar employment.[112] Title VII instructs courts to reduce any backpay award by the amounts actually earned or earnable during the backpay period.[113] Even though plaintiffs are required to mitigate their damages, a defendant bears the burden of proving that a plaintiff failed to discharge his or her duty to mitigate.[114] However, once a plaintiff has established that her employer unlawfully discriminated against her a presumption in favor of full relief arises.[115]

In determining whether a plaintiff has met her burden of exercising reasonable diligence, a critical question that arises concerns the time at which a plaintiff's action or inaction in the job market terminates the accrual of backpay against the employer. Generally, a backpay period begins to run from the date of the discriminatory conduct and continues until the date of entry of judgment against the employer.[116] However, there are particular circumstances, as explained in this section, that may alter that period for the plaintiff and result in the tolling and reduction of their backpay awards. Case law reveals that district courts are empowered with the discretion to determine when the backpay period should end based on the unique facts and circumstances surrounding each case.[117] Thus, the particular situations in which mitigation is warranted, and the means by which courts will modify damage awards in the absence of mitigation, are quite varied. This section will examine mitigation issues surrounding plaintiffs' employment histories during the claimed backpay period. Particular circumstances that may affect their backpay awards include a plaintiff's voluntary or involuntary removal from the job market and also moonlighting or part-time employment.

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[110] Ellis v. Ringgold Sch. Dist., 832 F.2d 27, 30 (3d Cir. 1987).

[111] Brady v. Thurston Motor Lines, 753 F.2d 1269, 1275-76 (4th Cir. 1989).

[112] Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).

[113] 42 U.S.C. § 2000e-5(g)(1) (1999).

[114] Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). *See, e.g.*, EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1252-53 (11th Cir. 1997); United States v. City of Chicago, 853 F.2d 572, 578-79 (7th Cir. 1988).

[115] Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989).

[116] Sands v. Runyon, 28 F.3d 1323, 1327 (2d Cir. 1994); Thorne v. City of El

A. Voluntary Removal from the Job Market

Generally, plaintiffs who voluntarily resign or remove themselves from the job market have not adequately mitigated their damages.[118] Thus, a plaintiff's backpay will be tolled as of the date she removed herself or resigned from subsequent employment. Case law holds that if the plaintiff removed herself based entirely on personal reasons, she has not mitigated her damages.[119] However, "a voluntary quit does not toll the backpay period when it is motivated by unreasonable working conditions or an earnest search for better employment."[120]

Unique mitigation circumstances arise when plaintiffs decide to remove themselves voluntarily from the job market for

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Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986).

[117] *See* EEOC v. Monarch Mach. Tool Co., 737 F.2d 1444, 1452 (6th Cir. 1980); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 932 (10th Cir. 1979) (stating commencing and ending dates of backpay should be within the court's discretionary authority).

[118] *See* Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 696 (2d Cir. 1998). *But see* Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527-28 (11th Cir. 1991) (refusing to suspend claimant's back period where claimant resigned from mitigating job due to financial pressures).

[119] *Hawkins*, 163 F.3d at 696.

[120] *Id.* (citing EEOC v. Delight Wholesale Co., 973 F.2d 664, 670 (8th Cir. 1992)).

additional schooling, to open their own business, to have a baby, or because they relied on a non-compete clause. To determine whether a plaintiff has exercised reasonable diligence courts will consider whether the removal was a reasonable, informed decision based on the particular facts of each case. In all of these situations, plaintiffs need to remember to make detailed accounts and records of all of their mitigation efforts. The more their efforts are documented, the more likely the court will determine they have met their burden to mitigate their losses.

1. *Education, Re-Training or Schooling*

Many reasonable persons conclude that their best strategy in the long run is to leave the job market temporarily and pursue formal educational opportunities after their employment was terminated. Although it may seem like a good idea, it may have disastrous effects upon a plaintiff's ability to gain backpay. In such cases, courts perform a fact-specific inquiry focusing on the central question of whether an individual's furtherance of his own education is inconsistent with the responsibility to use reasonable diligence in finding other suitable employment.[121] In general, as long as the plaintiff continues to exercise reasonable diligence in searching for other employment, the fact that he is in school will not toll his backpay.[122] If, however, the plaintiff's educational decision makes him unavailable to return to work, and is inconsistent with the duty to search for comparable work, courts will often toll the accrual of backpay during the time the plaintiff is in school.[123]

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[121] *See* EEOC v. Guardian Pools, Inc., 828 F.2d 1507, 1511 (11th Cir. 1987) (finding full-time student entitled to backpay because she mitigated damages by working at least thirty hours per week); Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1274 (4th Cir. 1985) (enrolling in college did not remove claimant from job market because claimant would have quit college if he found employment); EEOC v. Local 638, 674 F. Supp. 91, 104 (S.D.N.Y. 1987) (attending school during backpay period when employment search becomes fruitless meets duty of mitigation).

[122] *See, e.g.,* Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989) (awarding backpay where claimant was part-time student because defendant failed to show any evidence to rebut claimant's testimony that while she was pursuing her education she remained "ready, willing, and available to accept employment").

Courts tend to distinguish between two types of cases. The first type involves either the situation where a plaintiff voluntarily absents himself from an active job market because he believes his ultimate earning potential will be enhanced with the benefit of further education or where the plaintiff fails to even seek alternate employment. For example, in *Miller v. Marsh*, the court held that the plaintiff was not entitled to backpay during the period in which he was attending law school.[124] The court denied the backpay because the plaintiff, after being terminated, enrolled in law school without first pursuing a comparable position.[125] Thus, the plaintiff failed to satisfy his duty to mitigate.[126] Similarly, in *Hanna v. American Motors Corp.*, the court did not toll the backpay period when plaintiff was in school because he had satisfied his duty to mitigate damages.[127] Hanna had contacted employment agencies, career placement services, reviewed classifieds, and sent out resumes before he decided to attend school.[128] Hanna had only decided to attend school because he needed to obtain income following a fruitless job search, not to reap greater future earnings.[129]

The second type of situation arises when a plaintiff decides to pursue educational opportunities only after he or she has conducted a reasonable, diligent search and failed to secure adequate employment. In these circumstances, courts generally hold that a plaintiff has satisfied his duty to mitigate damages.[130] For example, in *Dailey v. Societe Generale*, the plaintiff was discharged from her job as a banker.[131] After six months of searching for a comparable job in the banking industry, she enrolled in school for training as a physician's assistant in order to obtain needed income after a fruitless job search.[132] Similarly, in *EEOC v. Guardian Pools, Inc.*, the plaintiff was discriminatorily denied a position with defendant as a pool service attendant.[133] The plaintiff found alternative employment as a typesetter and quit that job to attend college. The court did not toll her backpay because the fact that she worked part-time throughout college demonstrated her availability for work throughout the backpay period.[134] Finally, in *Gaddy v. Abex Corp.*, the Seventh Circuit found that a plaintiff's backpay would not be tolled during the fifteen-month period during which the plaintiff was in school, where there was no evidence that the plaintiff suspended efforts to search for work during that time.[135]

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[123] *See* Dailey v. Societe Generale, 108 F.3d 451, 456-57 (2d Cir. 1997) (stating question of whether claimant has satisfied duty to mitigate should be "whether an individual's furtherance of his education is inconsistent with his responsibility to use reasonable diligence in finding other suitable employment"); Miller v. Marsh, 766 F.2d 490, 492-93 (11th Cir. 1985) (finding as full-time law student, claimant had not fulfilled her duty to mitigate).

[124] *Miller*, 766 F.2d at 492-93.

[125] *Id.* at 492.

[126] *Id.*

[127] Hanna v. American Motors Corp., 724 F.2d 1300, 1308 (7th Cir. 1984) (noting that Hanna enrolled in college because he had nothing else going for him at that time).

[128] *Hanna*, 724 F.2d at 1308.

[129] *Id.*

Plaintiffs' employment lawyers are often asked by their clients for advice and guidance on this issue. Perhaps the best advice possible is to make certain that, before embarking upon additional education that clearly would render the plaintiff unavailable for comparable employment, he or she make a comprehensive record of conventional mitigation efforts, as discussed previously. It is evident from the case law that the courts do not look favorably on claimants that decide to pursue educational opportunities immediately after being discharged. Thus, a plaintiff must be aware that he needs to look for comparable employment *before* they attend school.

It would also be helpful to check and document employment forecasts for those with the type of training under consideration, in order to bolster a showing that the decision to gain additional education is reasonable in the long term. An argument that, but for the defendant's unlawful discrimination or other unlawful conduct, the plaintiff would not have been faced with such a perceived necessity is a persuasive and logical one. Obviously, based upon the case law, any educational pursuit that would leave time for at least some employment would assist in making the argument that the backpay period should not cease.

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[130] *See, e.g.*, Dailey v. Societe Generale, 108 F.3d 451, 457 (2d Cir. 1997) (finding claimant's decision to enroll in school not motivated by money, but instead by fact that her fruitless job search was making it difficult to support herself); Smith v. American Serv. Co., 796 F.2d 1430, 1432 (11th Cir. 1986).

[131] *Dailey*, 108 F.3d at 457.

[132] *Id.*

[133] *Guardian Pools*, 828 F.2d at 1511.

[134] *Id.*

[135] Gaddy v. Abex Corp., 884 F.2d 312, 319 (7th Cir. 1989).

2. *Self-Employment*

Another option that plaintiffs may pursue after they have been terminated from their employment is to remove themselves voluntarily from the job market and go into business for themselves. Courts generally hold that self-employment, if it is undertaken in good faith and is a reasonable alternative to seeking other comparable employment, may be considered permissible mitigation.[136]

In *Smith v. Great American Restaurants, Inc.*, the court found that plaintiff's decision to go into business for herself was a reasonable one and did not toll her backpay award.[137] Smith was employed as a restaurant manager when she was unlawfully terminated by her employer. After being terminated, Smith initially looked for a job by submitting an application at the Indiana Job Source (which never contacted her) and reading advertisements in the newspaper. Within a week, however, she entered into an oral lease for a new restaurant facility and began making plans to start her own business. The court held that Smith's decision to open a restaurant was reasonable for someone with her experience and training.[138] In fact, Smith's efforts in opening and operating her restaurant were serious and were much greater than required by an ordinary full-time job.[139] Similarly, in *Hawkins v. 1115 Service Care*, the Second Circuit affirmed a jury verdict that a plaintiff had acted reasonably and in good faith when she decided to earn money as a self-employed attorney.[140] After the plaintiff had been unlawfully terminated, she accepted employment at another law firm. The job involved longer hours, fewer fringe benefits, and more stressful work than she was performing before defendants terminated her employment. After finding these conditions unsatisfactory, the plaintiff resigned and began to look for comparable employment. In the meantime, she made a reasonable decision to earn money as a self-employed attorney.[141] Finally, in *EEOC v. Blue & White Service Corp.*, the court found that a plaintiff's decision to enter into self-employment was reasonable.[142] The plaintiff had searched for a position through traditional means for a two-and-a-half-year period prior to becoming self-employed. The court held that, overall, the claimant had exercised reasonable diligence, thus satisfying the duty to mitigate.[143]

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[136] *See* Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 696 (2d Cir. 1998) (deciding claimant's efforts as self-employed attorney were sufficient to satisfy duty to mitigate); Smith v. Great Am. Restaurants, Inc., 969 F.2d 430, 438 (7th Cir. 1992) (concluding that reasonable juror could find claimant's opening of restaurant was appropriate mitigating venture).

[137] *Great Am. Restaurants*, 969 F.2d at 438.

[138] *Id.*

But it is not enough that the decision to enter self-employment is a reasonable one. A court will examine the nature of a claimant's efforts at self-employment in order to determine whether they meet the duty to mitigate. For example, in *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, an ADEA claimant sold various trinkets found in his basement at a flea market and asserted that such activity constituted reasonable self-employment.[144] Although the Fifth Circuit affirmed the general rule that self-employment can satisfy the burden of diligence in mitigation, the court held that the plaintiff did not satisfy his burden with his flea market enterprise.[145] In rejecting the plaintiff's efforts as insufficient, the court relied on the facts that he did not approach the flea market as a business; his flea market business was never more than a part-time enterprise, and he was fully capable of continuing his job search during the week.[146] Similarly, in *Coleman v. Lane*, the court found that plaintiff's decision to go into business for himself was unreasonable, where the plaintiff had no experience as an entrepreneur, did not make any serious attempts to form or market his business, and did not search for substantially similar employment while being self-employed.[147]

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[139] *Id.* (pointing out that myth of starting one's own business cannot constitute diligent effort at mitigation has "distinctly un-American ring").

[140] *Hawkins*, 163 F.3d at 696.

[141] *Id.*

[142] EEOC v. Blue & White Serv. Corp., 674 F. Supp. 1579, 1582 (D. Minn. 1987). *See also* EEOC v. Ilona of Hungary, Inc., 97 F.3d 204, 216-17 (7th Cir. 1996) (holding plaintiff's decision to open Subway franchise was reasonable after she had diligently searched for comparable work as esthetician).

[143] *Blue & White Serv. Corp.*, 674 F. Supp. at 1582.

[144] Hansard v. Pepsi-Cola Metro. Bottling Co., Inc., 865 F.2d 1461, 1468 (5th Cir. 1989).

Self-employment raises computational problems uncommon to traditional mitigation efforts or to total abandonment of the job market. The court must determine the effect of a claimant's self-employment earnings, or more typically lack thereof, upon the backpay award. Generally, the defendant is not required to "subsidize" a claimant's new business venture.[148] The fact that the claimant funnels income of the business into inventory, expenses, and overhead, rather than salary, is problematical from a computational viewpoint. Generally, courts have held that defendants are entitled to a reduction of the backpay award, not just in the amounts actually drawn as salary by the claimant, but in an amount equal to or approximating the reasonable value of the claimant's services to the business.[149]

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[145] *Hansard*, 865 F.2d at 1468.

[146] *Id.*

[147] Coleman v. Lane, 949 F. Supp. 604, 612 (N.D. Ill. 1986).

[148] *See, e.g.,* Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1215 (D.D.C. 1990) (declaring claimant responsible for her lost backpay because it was her decision to take risked self-employment instead of seriously attempting to secure comparable employment).

[149] *See* Johnson v. Chapel Hill Indep. Sch. Dist., 853 F.2d 375, 383 (5th Cir. 1998) (holding since claimant worked in her family's grocery store backpay was reduced by amount claimant could have earned with reasonable diligence); Armstrong v. Index Journal Co., 647 F.2d 441, 449 (4th Cir. 1981) (illustrating many factors that must be added into claimant's backpay amount including commissions claimant would have earned during unemployed period); McCluney v. Joseph Schlitz Brewing Co., 540 F. Supp. 1100, 1103 (E.D. Wis. 1982) (figuring

Thus, in *McCluney v. Joseph Schlitz Brewing Co.*, the court reduced the backpay award by the value of "in-kind remuneration" the claimant earned for services rendered as a self-employed individual in an oil and gas venture.[150] The court reached this holding despite claimant's contention that he received no income for his work.[151] The court regarded the fact that the claimant's ownership interests had been used as collateral on a loan for the business as evidence of its value.[152]

3. *Pregnancy*

It is no surprise to anyone that employers, despite Title VII's prohibitions of sex discrimination in employment, often discriminate against pregnant employees or women they fear will become pregnant. Pregnancy related cases can be especially difficult for the plaintiff from a damages standpoint because the issue of backpay accrual following a birth is certain to be an issue. A similarly common scenario is the employee who becomes pregnant following a discharge at some point during the backpay period. If a claimant becomes pregnant subsequent to an act of discrimination against her, defendants will often argue that the backpay period should toll during pregnancy because the claimant was not available for work during that portion of the backpay period or during some time period after the birth. However, courts rarely treat the entire pregnancy as a period in which the claimant was unavailable for work. Rather, the courts apply the general rules of mitigation to examine whether a claimant exercised reasonable diligence in seeking alternative employment despite her pregnancy with reference to her subsequent child-care arrangement.[153]

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into backpay award claimant's ownership interests in partnership venture entered into while mitigating); *see also* Scott v. Oce Indus., Inc., 536 F. Supp. 141, 148 (N.D. Ill. 1982) (reducing backpay by value of services rendered because backpay period cut off at date claimant committed herself to remaining self-employed).

[150] *McCluney*, 540 F. Supp. at 1102-04.

[151] *Id.*

[152] *Id.*

[153] *See* EEOC v. Service News Co., 898 F.2d 958, 963-64 (11th Cir. 1990) (awarding claimant backpay where her employment efforts were futile because she

For example, in *EEOC v. Service News Co.*, a claimant who had been unlawfully terminated by a defendant stopped looking for work approximately one month prior to her due date because she assumed that no employer would hire someone who was eight months pregnant.[154] The district court tolled the backpay period from the time the claimant left the job market one month prior to her due date until one month after she had the baby.[155] The court held, without any specific evidence on the point, that the claimant would have been able to return to work one month after the delivery and assumed that she would have done so.[156] The Fourth Circuit, taking a considerably more employer-oriented view, overruled the lower court and held that backpay should be tolled until the date claimant actually returned to work.[157] The court rejected the lower court's surmise that the plaintiff would have returned to work one month after the birth and held that backpay should be tolled for the entire period that the claimant remained unemployed.[158]

Although the court in *Service News* tolled the backpay period until the claimant actually returned to work, other courts have held that the backpay period should resume at the time that the claimant diligently re-enters the job market. In *Harper v. Thiokol Chemical Corp.*, the defendant had a company policy that disallowed a return to work after pregnancy until the employee had a normal menstrual period post partum.[159] The district court held that this policy, and claimant's

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was pregnant); Beck v. Quicktrip Corp., 708 F.2d 532 (10th Cir. 1983); Harper v. Thiokol Chem. Corp., 619 F.2d 489, 493-94 (5th Cir. 1980) (noting that although pregnant, plaintiff made serious efforts to obtain mitigating employment); EEOC v. Corinth, Inc., 824 F. Supp. 1302, 1310-11 (N.D. Ind. 1993) (noting pregnant claimant has duty to mitigate damages); Hayes v. Shelby Mem'l Hosp., 546 F. Supp. 259, 266-67 (N.D. Ala. 1982) (denying backpay where pregnant claimant made no attempt to find mitigating employment).

[154] *Service News*, 898 F.2d at 961.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] Harper v. Thiokol Chem. Corp., 619 F.2d 489, 490 (5th Cir. 1980).

subsequent termination, discriminated against the plaintiff.[160] The court awarded continuous backpay, including the period of a subsequent pregnancy that occurred six months after the termination.[161] The defendant argued that when the claimant became pregnant again she would have been unable to work, and, therefore, the district court abused its discretion to award backpay for the entire period in which claimant had become pregnant. The Fifth Circuit held that it was not an abuse of discretion to award backpay for the entire period because the claimant had made reasonably diligent efforts to find work during the six months immediately subsequent to her termination and that the subsequent pregnancy should not be a factor in the computation.[162] Similarly, in *EEOC v. Corinth, Inc.*, the court held that the backpay period should run from the date plaintiff was discharged until the date she stopped working in order to have her baby and then run again when she diligently returned to the job market three weeks after her baby was born until the date she decided to go back to school.[163] The court held this was reasonable because the defendant had failed to meet his burden of proving that plaintiff did not act diligently in finding comparable employment.[164]

4. *Reliance on a Non-Compete Clause*

In addition to the more common post-termination activities, it is worthwhile for employment attorneys to at least consider other factors that might excuse or relieve a terminated employee's duty to mitigate in the traditional sense. For example, some employers require their new employees to sign a non-complete clause in an employment contract. These types of clauses are common in some sales-related and other businesses. Non-compete clauses should be considered, as they apply to a plaintiff's duty to mitigate, regardless of an attorney's independent assessment of their enforceability.

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[160] *Harper*, 619 F.2d at 493.

[161] *Id.*

[162] *Id.* at 494.

[163] EEOC v. Corinth, Inc., 824 F. Supp. 1302, 1311 (N.D. Ind. 1993).

[164] *Corinth*, 824 F. Supp. at 1311 (noting that failure to mitigate is affirmative defense with burden of proof on defendant).

Case law on this subject seems to suggest that it is the employee's good-faith interpretation of what is permissible post-termination activity that will be determinative. For example, in *Ross v. Twenty-Four Collection, Inc.*, the court found that a Title VII claimant reasonably believed that she was legally barred from accepting substantially equivalent employment due to a non-compete clause that she had signed upon being hired by the defendant.[165] The court held that although the claimant was "not diligent in her search for new employment," her lack of diligence was excusable because of her reasonable reliance on the non-compete clause.[166]

B. *Involuntary Removal from the Job Market*

Just as there exists a number of post-termination activities that involve voluntary withdrawal from the traditional job market, there are a variety of involuntary removals from the job market that can impact the backpay period. These include situations where a plaintiff had to leave the interim job due to an injury or illness or situations where the plaintiff has been terminated from the interim job. In general, a plaintiff who is unavailable for work is incapable of satisfying his or her duty to mitigate damages. However, as with all mitigation cases, the award or denial of backpay depends on the particular facts and circumstances of each case.

1. *Injury and Illness*

The general rule is that if a plaintiff is injured or becomes ill subsequent to a discriminatory or otherwise unlawful termination, backpay may be tolled because the claimant is considered to have left the job market or is otherwise unemployable.[167] However, if the claimant can prove that the injury or illness is attributable to a defendant's act of discrimination, the backpay period will not be tolled.[168]

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[165] Ross v. Twenty-Four Collection, Inc., 681 F. Supp. 1547, 1554 (S.D. Fla. 1988).

[166] *Ross*, 681 F. Supp. at 1553-54 (noting that discriminating defendants were totally in control of operation of restrictive covenant).

For example, in *Thurman v. Yellow Freight Systems, Inc.*, the defendant discriminated against the plaintiff by failing to hire him as a full-time employee.[169] He mitigated his damages and found substantially similar employment. However, he suffered a back injury due to an accident on the job site.[170] The court held that the accident was not the plaintiff's fault; thus, the backpay period was not tolled.[171] Similarly, in *Whatley v. Skaggs Companies, Inc.*, the claimant was discriminatorily discharged from his position as a lobby manager at one of the defendant's retail stores.[172] Subsequent to his termination the claimant took a job at a meat-packing plant where he suffered an on-the-job back injury which led to his partial disability.[173] The district court awarded full backpay, including the period subsequent to claimant's injury when he was not in the job market.[174] On appeal, the employer argued that the district court erred in its calculation of the backpay award because backpay should have been tolled for the period when claimant was disabled and not seeking employment.[175] The Tenth Circuit held that the district court's refusal to reduce backpay was not an abuse of discretion.[176] Taking a broad view of proximate cause, the court affirmed the lower court's findings that there was no bad-faith failure by claimant to mitigate during the period of disability.[177] The court held that "Whatley would not have suffered his disabling back injury had Skaggs not terminated him as a lobby manager. Skaggs' act of discrimination forced Whatley from his management position to blue-collar jobs that required strenuous physical labor resulting in injury to his back."[178]

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[167] *See* Smith v. Office of Personnel Management, 778 F.2d 258, 263 (5th Cir. 1985) (noting that district court has discretion to reduce plaintiff's award by sums received from collateral services); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401 (3d Cir. 1976) (holding backpay period tolled during period of illness).

[168] *See* Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473, 1480 (6th Cir. 1990) (holding backpay awarded where injury was aggravated by defendant's discriminatory conduct; backpay ends when injury is no longer attributable to defendant or claimant is able to return to work); Whatley v. Skaggs Cos., Inc., 707 F.2d 1129, 1138 (10th Cir. 1983) (noting that trial court's refusal to deduct plaintiff's disability benefits from defendant's backpay liability was not error); Austen v. State of Hawaii, 759 F. Supp. 612, 628-29 (D. Haw. 1991) (holding defendant responsible for claimant's injury, therefore, claimant awarded front pay); Grundman v. Trans World Airlines, 54 F.E.P. Cases (BNA) 224 (S.D.N.Y. 1990) (finding where claimant was hurt in auto accident returning home from interim job, backpay awarded because claimant proved that accident was related to change of jobs and there was no indication that accident would have occurred had claimant remained in defendant's employ).

[169] Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1169 (6th Cir. 1996) (noting that trial court found that "Yellow Freight's proffered reasons for not hiring Thurman were a pretext for discrimination").

[170] *Thurman*, 90 F.3d at 1169.

[171] *Id.*

[172] *Whatley*, 707 F.2d at 1132-33.

[173] *Id.* at 1134.

2. *Discharge from Interim Employment.*

While an employee who voluntarily quits subsequent employment during the interim period will likely be deemed to have failed to mitigate his or her damages reasonably, the issue of involuntary termination from a subsequent comparable job is more difficult. Involuntary termination can involve the plaintiff to be either terminated from employment "for cause" or "not for cause."

The general rule is that an involuntary termination for cause from a subsequent comparable job will terminate a plaintiff's backpay award. For example, the court in *NLRB v. Ryder System, Inc.*, held that if an employee suffers a "willful loss of earnings" the employer's backpay liability is tolled.[179] In *Ryder*, an employer claimed backpay was tolled because the plaintiff was fired for insubordination, and therefore suffered a willful loss of earnings.[180] The court held that "a discharge from interim employment will toll backpay liability only if the employee's misconduct was 'gross' or 'egregious.'"[181] Similarly, an employee's discharge for cause due to his wilful violation of company rules will toll backpay.[182] However, if an employee was terminated from subsequent employment for cause, such as a lay-off or a reduction in force, then backpay will generally not be tolled. For example, in *Thurman v. Yellow Freight Systems, Inc.*, the court held that a plaintiff's backpay period would not be tolled due to his termination from subsequent employment.[183] The plaintiff was discharged because he had been involved in an accident on the company's property.[184] However, there was no evidence that the plaintiff acted intentionally. Therefore, the court held that Yellow Freight had failed to establish that the plaintiff "acted willfully or committed a gross or egregious wrong."[185]

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[174] *Id.* at 1137.

[175] *Id.* at 1137-38.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1138 n.8.

[179] NLRB v. Ryder Sys., Inc., 983 F.2d 705, 712 (6th Cir. 1993).

[180] *Ryder Sys., Inc.*, 983 F.2d at 712-13.

The fact that courts have cast the issue in terms of whether the subsequent termination was for cause raises interesting possibilities for the defense attorney. Normally, a plaintiff's subsequent or prior job performance with a different employer would be a wholly irrelevant consideration in an employment discrimination or wrongful discharge case. Because the issue in most employment discrimination cases is intent where there is an attempt to discover why the employee was terminated, courts are generally unconcerned with the plaintiff's work history either before or after working for the defendant. However, when defending against a case where a plaintiff has been terminated from subsequent employment, it may be wise to take further discovery on the basis for the termination and to subpoena the employee's personnel file and other relevant documents from the subsequent employer. The defense attorney may obtain documents or potential witnesses, such as a former supervisor, who can provide evidence of a termination for cause. In addition, to the extent that the investigation reveals other negative information about the plaintiff's work history that the defense attorney may not otherwise be able to present to the judge or jury, this approach may enable him to get such unflattering evidence in through the "backdoor."

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[181] *Id.* at 713.

[182] Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1276-77 (4th Cir. 1985).

[183] Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1169 (6th Cir. 1996).

[184] *Thurman*, 90 F.3d at 1169.

[185] *Id.*

C. Moonlighting and Part-Time Employment

After a plaintiff has been unlawfully terminated, she has a duty to exercise due diligence in finding substantially comparable employment. Once a plaintiff has found comparable employment, she may also decide to work part-time or "moonlight" for additional income. The general rule on "moonlighting," or part-time employment during the interim period, is that if the plaintiff would have been able to work both the original job where he was unlawfully terminated and the second job simultaneously, earnings from the second job will not be deducted from the backpay award.[186]

For example, the court in *Chesser v. State of Illinois* held that moonlighting earnings did not constitute "interim earnings."[187] The court defined "interim earnings" as wages, or the like, earned by a discriminated-upon employee in the period after discharge but before judgment that, but for the discrimination, would not have been earned.[188] According to employee guidelines, defendant did not allow state troopers to moonlight where the second job was in the same occupation as a state trooper.[189] However, employees could moonlight in some other occupations, such as a job as a grocery clerk.[190] Thus, the plaintiff would not have been able to hold a moonlighting job as a security guard while employed for the defendant. As a result, the court held that the state trooper's interim earnings would be deducted from his backpay award.[191] Similarly, the Sixth Circuit, in *Thornton v. East Texas Motor Freight* found that the claimants, over-the-road truck drivers who work 60-to-100 hours a week, could not have held their moonlight jobs and their original jobs simultaneously.[192] Thus, the court held that the plaintiffs interim earnings should be deducted from the backpay award.[193]

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[186] *See* Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1111-12 (8th Cir. 1994) (noting that money earned from free-lance consulting work could have been earned even if claimant had remained employed at ITT); Lilly v. City of Beckley, 797 F.2d 191, 196 (4th Cir. 1986) (holding that if plaintiff could hold supplemental job at same time, earnings from supplemental job will not be used to reduce backpay award); Whatley v. Skaggs Cos., Inc., 707 F.2d 1129, 1139 (10th Cir. 1983) (holding plaintiff's "moonlighting earnings" must be deducted as "interim" earnings from backpay award since plaintiff would not have been able to earn them if employed at discriminating job); Bing v. Roadway Express, Inc., 485 F.2d 441, 454 (5th Cir. 1973) (holding that if claimant could have held supplemental job concurrently, that income will not be deducted from backpay award).

[187] Chesser v. Illinois, 895 F.2d 330, 337-38 (7th Cir. 1990).

[188] *Chesser*, 895 F.2d at 337-38.

An example of non-deductible moonlight earnings is found in *Behlar v. Smith*. The claimants in *Behlar* were university professors who worked various summer and evening jobs during the interim period.[194] The Eighth Circuit held that the income claimants received from these jobs would not be deducted because claimants could have earned this income even had they been employed in the original jobs.[195]

IV. CONCLUSION

The law applicable to a plaintiff's duty to mitigate damages can be difficult for practitioners to locate and master, inasmuch as discussions of mitigation issues typically receive brief treatment near the conclusions of lengthy decisions which primarily concern issues of liability. Adding to the difficulty is the myriad of ways in which terminated employees react to and carry on with their lives following terminations of employment, many of which are difficult to categorize within the body of case law concerning mitigation.

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[189] *Id.* at 337.

[190] *Id.*

[191] *Id.* at 338.

[192] Thornton v. East Texas Motor Freight, 497 F.2d 416, 422 (6th Cir. 1974). *See also* Whatley v. Skaggs Cos., Inc., 7078 F.2d 1129, 1139 (10th Cir. 1983) (interim earnings deducted where claimant would not have worked both jobs because he would have worked long hours at original job out of his desire to get promoted).

[193] *Thornton*, 497 F.2d at 422.

[194] Behlar v. Smith, 719 F.2d 950, 954 (8th Cir. 1983).

[195] *Behlar*, 719 F.2d at 954.

This article has attempted to survey and categorize the law of mitigation with respect to the array of factual situations which typically arise in employment cases and to provide a resource and guide for practitioners and judges who must argue and identify that elusive point at which a plaintiff has satisfied the duty to mitigate.

COMMENTS

CREDITORS TAKE ONE STEP FORWARD AND DEBTORS TAKE TWO STEPS BACK: PROMOTING COMPETITION BY TERMINATING EXCLUSIVITY RIGHTS OF DEBTORS UTILIZING THE "NEW VALUE" EXCEPTION

INTRODUCTION

Under the Bankruptcy Code,[1] a financially distressed business may, without the consent of its creditors, file a Chapter 11 petition for reorganization[2] and, thereby, avoid liquidation.[3] As the United States Supreme Court noted, "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."[4] The interests of creditors in receiving payment of debts owed them stand in direct conflict with those of the business and of society[5] in general in reorganizing and maintaining existing businesses.[6] In an

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[1] 11 U.S.C. §§ 101-1330 (1994 & Supp. 1999).

[2] 11 U.S.C. § 301 (1994).

[3] The Fifth Circuit Court of Appeals has recognized that the Code encourages reorganizations by providing the debtor "a reasonable opportunity to make a fresh start." B.M. Brite v. Sun Country Dev., Inc. (*In re* Sun Country Dev., Inc.), 764 F.2d 406, 408 (5th Cir. 1985). Courts seem to agree that businesses, like the "honest but unfortunate debtor" of Chapter 7 bankruptcy, deserve and need a "fresh start" to enable them to continue operating successfully following reorganization. MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY 956 (1996).

[4] N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984). *See also* Bonner

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Mall Partnership v. United States Bancorp Mortgage Co. (*In re* Bonner Mall Partnership), 2 F.3d 899, 915 (9th Cir. 1993) (recognizing that reorganization serves to stop liquidation of businesses); CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 73 (1997) (commenting that reorganization protects business' going-concern value). Courts have been hesitant to confirm reorganization plans that do not encourage this policy. *In re* Rusty Jones, Inc., 110 B.R. 362, 375 (Bankr. N.D. Ill. 1990).

According to the "creditor's bargain" theory of reorganization, allowing an enterprise to reorganize rather than liquidate results in "a going concern value greater than the value realized in piecemeal sales of assets through state law collection remedies." Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be?*, 19 PEPP. L. REV. 1311, 1322 (1992). For a complete discussion of the "creditor's bargain" theory of reorganization, see Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain*, 75 VA. L. REV. 155 (1989); Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN L. REV. 725 (1984); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982). Under the "loss allocation" theory, bankruptcy is seen "as a process that Congress created to allocate losses among all interested parties when a debtor encounters financial distress." Rusch, *supra*, at 1324. Thus, the bankruptcy laws, according to this theory, reflect the balance Congress intended to strike between the contrasting rights of debtors and creditors. *Id.* For a thorough analysis of the "loss allocation" theory of reorganizations, see Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 EMORY L.J. 1009, 1013-34 (1987).

[5] Most studies of bankruptcy proceedings have generally acknowledged that society suffers when businesses are liquidated rather than reorganized. *See, e.g.*, SCARBERRY, *supra* note 3, at 4. One source indicated that

> the cost to society of business liquidations is high. The destruction of value caused by business liquidations reduces the total wealth of our society. The loss of jobs causes additional social costs, such as increased unemployment insurance payments, increased use of other social welfare programs, and decreased tax revenues. Increased unemployment may have other social costs, such as an increase in poverty and crime. If overall demand for the products of the kind made by a liquidated business do not decrease, many of the workers and managers may eventually be hired by other firms for similar positions, but this does not happen quickly, and it is not cost-free.

Id.

[6] Obviously, "[t]he creditors' interest in prompt payment must be balanced against the legitimate needs of the debtors to reorganize while under the court's protection." Jerome R. Kerkman, *The Debtor in Full Control: A Case for Adoption*

effort to balance these competing interests, the Code first provides a debtor the exclusive right to submit a plan for reorganization within the initial 120 days following the filing of a Chapter 11 petition.[7] Additionally, the Code affords cred-

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of the Trustee System, 70 MARQ. L. REV. 159, 180-81 (1987). One commentator has suggested that the Code represents an accommodation between the interests of creditors in being paid and the interests of debtors in successfully reorganizing. David A. Skeel, *The Uncertain State of an Unstated Rule: Bankruptcy's Contribution Rule After* Ahlers, 63 AM. BANKR. L.J. 221, 223 (1989). Skeel further argued that the absolute priority rule and the "new value" rule may be viewed as surrogates for these two competing goals. *Id.* at 229. *See also* Benjamin E. Marcus, *The Changing Contours of the Absolute Priority Rule in Reorganizing Proceedings Under Chapter 11 of the Bankruptcy Code*, 7 ME. B.J. 390, 391 (1992) (noting that courts, "exercising their equitable powers, have long entertained an exception to the harsh effect of the absolute priority rule when shareholders contribute new value to the reorganized debtor"). Yet, while the debtor has the right to attempt to reorganize, "the bankruptcy code does not guarantee that a debtor will emerge unscathed or that his business will be successfully reorganized." United States v. Jackson (*In re* Jackson), 190 B.R. 808, 811 (W.D. Va. 1995).

[7] 11 U.S.C. § 1121(b) (1994). Two underlying goals support the maintenance of this 120-day period in which debtors have the sole right to propose a reorganization plan. *In re* River Bend-Oxford Assocs., 114 B.R. 111, 114 (Bankr. D. Md. 1990). Those goals are to provide the debtor with some breathing room in which to develop a satisfactory plan without the constant threat of a competing plan and, at the same time, to ensure that debtors do not have an unlimited time period in which to propose this plan. *In re* Mother Hubbard, Inc., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993). This right of exclusivity has troubled some bankruptcy critics, yet those scholars admit that, without it, there exists a strong possibility that debtors would refrain from "seeking . . . Chapter 11 protection [while] awaiting a financial miracle." David R. Kuney & Timothy R. Epp, *Aftermath of* Bonner Mall*: Evolution or Regression in the Notion of "New Value"?*, 5 J. BANKR. L. & PRAC. 211, 246 (1996).

Apparently, Congress found this period of 120 days adequate to allow debtors to reorganize, but, "recogniz[ing] that flexibility was needed to accommodate individual businesses, . . . allowed the court to lengthen or shorten the debtors' exclusive period to file a plan for cause shown." Kerkman, *supra* note 6, at 181. Indeed, the Code permits, if done within certain time periods, any party to request a reduction or an increase in that 120-day period. 11 U.S.C. § 1121(d) (1994). The exclusivity period may be shortened "for cause." *Id.* While the Code fails to delineate what constitutes "cause," a few courts have granted the request of creditors to shorten that 120-day period when there existed evidence of "strategic delay, gross mismanagement, or acrimonious feuding." Anthony L. Miscioscia, Jr., Note, *The Bankruptcy Code and the New Value Doctrine: An Examination into History, Illusions, and the Need for Competitive Bidding*, 79 VA. L. REV. 917, 950 (1993). *See* Texas Extrusion Corp. v. Lockheed Corp. (*In re* Texas Extrusion Corp.), 844 F.2d 1142, 1160-61 (5th Cir. 1988) (allowing decrease in exclusivity itors the authority to approve of or reject the debtor's proposed plan of reorganization.[8] However, the Code does not require absolute creditor approval in all cases; rather, the Code allows a debtor to "cramdown" the plan over the creditors' objections in certain cases.[9]

The Code specifically states that a plan may be confirmed without creditor consent if it "does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."[10] Further, the Code provides that a "fair and equitable" plan is one under which creditors with claims or interests junior to those of the dissenting class of unsecured creditors do "not receive or retain under the plan on account of such junior claim or interest any property."[11] That rule, commonly known as the absolute priority rule,[12] requires "that a dis-

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period for debtor's deliberate delay); *In re* Crescent Beach Inn, Inc., 22 B.R. 155, 160-61 (Bankr. D. Me. 1982) (granting decrease in exclusivity period because of "acrimonious feuding").

[8] 11 U.S.C. § 1126(a) (1994). One source declared that the power of creditors to reject a proposal remains "[t]he most important check on a debtor." ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 697 (3d ed. 1996).

[9] 11 U.S.C. §§ 1129(b)(1)-(b)(2) (1994).

[10] 11 U.S.C. §1129(b)(1) (1994).

[11] 11 U.S.C. §1129(b)(2)(B)(ii) (1994). Most courts liberally interpret the Code phrase "any property." 7 COLLIER ON BANKRUPTCY, ¶ 1129.04[4][a], at 1129-86 (Lawrence P. King ed., 15 ed. rev. 1999).

[12] One court has clarified that

> [t]he absolute priority rule, in its simplest terms, requires that creditors of a debtor in a bankruptcy reorganization receive payment of their claims in their established order of priority, and that they receive payment in full before lesser interest—such as those of equity holders—may share in the assets of the reorganized entity.

In re Johnson, 101 B.R. 307, 309 (Bankr. M.D. Fla. 1989) (quoting David M. Powlen & Arnold H. Wuhrman). In other words, the absolute priority rule "means that the shareholders of the debtor—whether a small closely held company or a large publicly held one—or the partners of a partnership, cannot keep anything unless they either pay the unsecured creditors in full or get the agreement of all of the unsecured creditor classes." James J. White, *Absolute Priority and New Value*, 8 T.M. COOLEY L. REV. 1, 1 (1991). *See also* David M. Powlen & Arnold H. Wuhrman, *The New Value Exception to the Absolute Priority Rule: Is* Ahlers *the Beginning of the End?*, 93 COM. L.J. 303, 303 (1988) (noting that absolute priority senting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property [under a reorganization] plan."[13]

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rule requires that creditors of debtor in bankruptcy reorganization receive payment of their claims in their established order of priority). Bankruptcy scholars have noted that "courts first read the doctrine [of absolute priority] into the statute in order to prevent recurrence of ineffectual reorganization adjustments under which inordinate prices were paid to avert threatened delays, nuisance claims, and occasional 'sweetheart' allocations to juniors." Walter J. Blum & Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. CHI. L. REV. 651, 653 (1974).

[13] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988). Certainly, "[t]he absolute or strict priority doctrine in corporate reorganizations under the Bankruptcy Act [was] never comfortable for practitioners or theorists to live with. Almost as soon as the courts articulated this standard of fairness, it was subjected to attack." Blum & Kaplan, *supra* note 12, at 651. Indeed, commentators have frequently suggested the "new value" exception exists to counter the harshness of the absolute priority rule. Bruce A. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN L. REV. 69, 87 (1991). *See also* Brian A. Basil, *The New Value Exception to Absolute Priority in Bankruptcy*, 101 COM. L.J. 290, 300 (1996) (indicating "new value" permits court to lessen negative impact of absolute priority); Michelle Craig, Note, *The New Value Exception: A Plea for Modification or Elimination*, 11 BANKR. DEV. J. 781, 784 (1994-1995) (noting that Supreme Court realized harshness of strict application of absolute priority rule). One court has similarly noted that the "new value" exception enables the court to prevent the inequity that often arises from strict adherence to the absolute priority rule. *In re* Jartran, Inc., 44 B.R. 331, 379 (Bankr. N.D. Ill. 1984). *See* Bridgeport Jai Alai, Inc. v. Autotote Sys., Inc. (*In re* Bridgeport), 215 B.R. 651, 654 (Bankr. D. Conn. 1997) (stating that Code should be broadly construed "to insure that the prospects of reorganization are not prematurely thwarted"). Even the United States Bankruptcy Commission, established in 1970 to revise the nation's bankruptcy laws, agreed that "the rigidity of the [absolute priority] rule has frequently resulted in the destruction rather than the protection of the interests of public investors . . . . [These investors] are frequently eliminated in a reorganization by reason of the strict application of a statute designed primarily for their protection." U.S. BANKRUPTCY COMMISSION, REPORT ON THE U.S. BANKRUPTCY LAWS, H.R. DOC. NO. 93-137, at 256 (1973). While it is likely true that the Code allows more flexibility than did the Bankruptcy Act in terms of its confirmation standards, "the rigid rule of absolute priority still permits one large creditor to block a feasible plan of reorganization." Clifford S. Harris, Note, *A Rule Unvanquished: The New Value Exception to the Absolute Priority Rule*, 89 MICH. L. REV. 2301, 2317 n.125 (1991).

The Code not only works to prevent junior classes from receiving or retaining any interests in the reorganized entity until all senior creditors are paid in full, but also ensures that those senior creditors do not receive any more than what is due them. TABB, *supra* note 4, at 840-41.

One of the most highly disputed issues related to the absolute priority rule has been whether there exists a "new value" exception[14] to the general rule.[15] Under the exception, old equity holders can contribute fresh capital and retain their equity interests in the reorganized entity without adhering to the absolute priority rule's requirement of full payment to all senior creditors prior to the retention of "any property" by such old equity holders.[16] Were this exception viable junior equity holders could circumvent the absolute priority rule by simply inserting capital into the reorganized business.[17]

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[14] Many courts and commentators alike have found the term "exception" to be somewhat misleading. Bonner Mall Partnership v. United States Bankcorp Co. (*In re* Bonner Mall Partnership), 2 F.3d 899, 906 (9th Cir. 1993). As *In re Bonner Mall Partnership* suggested, the "new value" exception "is not actually an exception . . . but is rather a corollary principle, or, more simply a description of the limitations of the rule itself. It is, as indicated above, the set of conditions under which former shareholders may lawfully obtain a priority interest in the reorganized venture." *In re Bonner Mall Partnership*, 2 F.3d at 906. *See also* Travelers Ins. Co. v. Bryson Properties (*In re* Bryson Properties), 961 F.2d 496, 503 n.11 (4th Cir. 1992) (noting ongoing debate as to true nature of "new value"); *In re* SM 104 Ltd., 160 B.R. 202, 225 (Bankr. S.D. Fla. 1993) (stating that "new value," in fact, "is not an exception at all, but merely a corollary to the absolute priority rule, and that, as such, the new value corollary still exists under the Code. . . ."). One commentator insightfully suggested that "the use of the term 'exception' to describe new value principles is a catachresis. The conditions required to satisfy the new value 'exception' also satisfy the absolute priority rule." Markell, *supra* note 13, at 96. *But see* Walter W. Miller, Jr., *Bankruptcy's New Value Exception: No Longer a Necessity*, 77 B.U. L. REV. 975, 1011 (1997) (contending that "[t]he new value exception functioned as an exception to the absolute priority rule, never as part of the absolute priority rule" nor as corollary to absolute priority rule).

[15] One commentator has indicated that "resolution of the new value issue will have tremendous implications for the relative bargaining power of debtors and creditors in Chapter 11 reorganization cases." Basil, *supra* note 13, at 291. The *In re Bonner Mall Partnership* court also noted as much. *In re Bonner Mall Partnership*, 2 F.3d at 901. Another legal scholar expanded upon this idea, pointing out that resolution of this issue would result in a reallocation of "the negotiating power and leverage given to the different parties to a reorganization by chapter 11." David R. Brinkman, *The New Value Exception to the Absolute Priority Rule After* Ahlers, 106 BANKING L.J. 351, 355 (1989).

[16] Baxter Dunaway, *Impact of Bankruptcy Review Commission Proposals on Real Estate*, 12 PROB. & PROP., July-Aug. 1998, at 41, 41.

[17] This right to retain equity interests by inserting capital is also subject to a number of other requirements. *See infra* notes 50-55 and accompanying text.

Clearly, prior to the enactment of the Code courts readily recognized and

Thus, with an investment of new capital, equity holders could maintain control of the company without first ensuring all creditors received full satisfaction of debts owed them. Unfortunately, the Code provides no clear answer to this issue,[18] and, at present, the United States Supreme Court has not taken a stance on it either despite a golden opportunity to do so in *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership.*[19]

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applied the "new value" exception. *In re Johnson,* 101 B.R. at 309. *See* Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78, 85-86 (1942) (stating that old equity holders may retain their position only with fresh contribution); Kansas City Terminal Ry. Co. v. Central Union Trust Co. of N.Y., 271 U.S. 445, 454-55 (1926) (declaring that, in certain instances, old shareholders should be permitted to maintain old equity interests as input of capital necessary because successful reorganization may not be available from any other source). As the *In re Johnson* court noted, the object of the exception's application was to ensure the reorganized business remained alive. *In re Johnson,* 101 B.R. at 309. Such a result "was also always considered to be a desirable goal and designed to promote the aim of congressional intent to permit financially distressed entities to achieve rehabilitation under Chapter 11." *Id.* at 309-10. Interestingly, no court under the Bankruptcy Act approved of a "new value" plan, but "there can be little doubt that the new value exception existed." Kenneth N. Klee, *Cramdown II,* 64 AM. BANKR. L.J. 229, 241 (1990). *See also* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1418 (1999) (noting no court prior to enactment of Code relied on *Case* dicta to approve "new value" plan).

[18] As one commentator noted, "The codification of the absolute priority rule in Code section 1129 contains no exceptions and no discussion of the new value exception to the rule." Marcus, *supra* note 6, at 391. *See also* Craig, *supra* note 13, at 789 (noting Code and legislative history both lack discussion of exception). Additionally, the legislative history offers no guidance on this matter either. Marcus, *supra* note 6, at 391. *See also* Klee, *supra* note 17, at 241 (writing that "[t]he new value exception was not codified as part of the Bankruptcy Code, but neither was there a legislative intent to eliminate the exception").

Other courts, however, have interpreted this Congressional silence as indicative of an intent to eliminate the exception. *In re* Drimmel, 108 B.R. 284, 289 (Bankr. D. Kan. 1989). Although a California bankruptcy court had its decision essentially overturned by the Ninth Circuit in *In re Bonner Mall Partnership*, the court there, like the court in *In re Drimmel*, interpreted the legislative history and found it indicated that the Code had abolished the "new value" exception. *In re* Outlook/Century Ltd., 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991). One can only be skeptical of this latter approach given the fact that Congress clearly stated it had not "codif[ied] all aspects of the fair and equitable rule." TABB, *supra* note 4, at 878.

[19] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1417. On two other occasions, the Court also failed to settle this dispute finally. *See* Norwest Bank Worthington

Part I of this Comment will briefly recount the development of the "new value" exception, will provide a survey of the differing opinions courts have had as to its vitality following the enactment of the Code, and will ultimately conclude that neither the Code nor the courts have satisfactorily settled the issue. Part II will focus on whether there should be such an exception and will conclude that there, indeed, should be one. Part III will discuss the United States Supreme Court's recent holding in *203 North LaSalle Street Partnership*,[20] and Part IV will offer several insights into exactly what impact the

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v. Ahlers, 485 U.S. 197, 203 n.3 (1988) (declining to reach issue of whether exception survived codification of absolute priority rule). *See also* Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 20 (1994) (finding review of Ninth Circuit's approval of "new value" plan unnecessary since settlement between creditor and debtor made issue of exception's existence moot).

Many bankruptcy commentators held high hopes that the United States Supreme Court would settle the matter when it granted certiorari in the *203 North LaSalle Street Partnership* case. *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1416. But, alas, the Court once again failed to "[pull] the proverbial trigger" and, as a result, failed to "help resolve a split in the Circuits that in some respects the Supreme Court itself created." Thomas J. Salerno, et al., *Urgent Message to the Supreme Court: "Just Do It!"*, 34 BANKR. CT. DEC., May 25, 1999, at 1, 1. *See also* Carla E. Craig, *Court's Ruling on "New Value" Exception Leaves Questions for Continued Debate*, 221 N.Y. L.J. 1, (col. 1) (May 12, 1999) (expressing regret that Court left several questions unanswered); Marvin Krasny & Kevin J. Carey, *United States Supreme Court Ducks Issue on Exception to Absolute Priority Rule: Long Awaited Decisions Raises as Many Questions as It Answers*, 220 LEGAL INTELLIGENCER, May 7, 1999, at 5, 5 (same). Some commentators have, however, attempted to "look on the bright side" of the situation to note that the Court, at least implicitly, upheld the exception while severely limiting it at the same time. John J. Rapisardi, *The New-Value Corollary: The Supreme Court Speaks*, 221 N.Y. L.J. 3, (col. 1) (May 20, 1999).

One possible problem foreseen by several bankruptcy scholars due to the lack of a definitive answer from the Supreme Court is that of potential forum shopping. Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 180 (1990). As Professors LoPucki and Whitford noted, debtors have an incentive to carefully select a circuit, if it is possible in the particular situation, which readily accepts "new value" plans. *Id.* Certainly, no one has actually studied this potential problem and provided specific findings, yet this possibility serves as just one example of why the Court should resolve the matter. Shannon C. Bogle, Note, Bonner Mall *and Single-Asset Real Estate Cases in Chapter 11: Are the 1994 Amendments Enough?*, 69 S. CAL. L. REV. 2163, 2173 (1996).

[20] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1424.

Court's decision in that case will have on future bankruptcy proceedings. Further, Part IV will examine how a "new value" plan can, in the future, satisfy the mandates of *203 North LaSalle Street Partnership*. Finally, Part V will analyze *In re Treasure Bay*,[21] one of the largest Chapter 11 cases in Mississippi, and will, using its facts, provide an example of how a bankruptcy case might be decided after *203 North LaSalle Street Partnership*.

I. THE BIRTH OF THE "NEW VALUE" EXCEPTION

A. *The Origins of the Exception*

Most bankruptcy scholars concur that the birth of the absolute priority rule occurred in railroad equity receivership cases[22] from the mid-1800s and early 1900s.[23] In those cases, the Court established a "fixed principle" of denying old equity holders any interests in the reorganized entity, regardless of the apparent lack of value of those interests, until all senior creditors received payment in full.[24] Shortly thereafter, in *Case v. Los Angeles Lumber Products Co.*, Justice William O. Douglas introduced into the case law[25] the concept of the

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[21] *In re* Treasure Bay Corp., 212 B.R. 520, 548 (Bankr. S.D. Miss. 1997). For a discussion of the facts of that case, see *infra* notes 181-93 and accompanying text, and for a discussion of the holding of that case, see *infra* notes 194-202 and accompanying text.

[22] One bankruptcy scholar has noted that these cases marked the entrance of the federal courts into the field of business reorganizations. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 21 (1995). Professor Tabb added that, in those days, "railroads were of great economic importance, but in dire financial straits." *Id.* at 21. Unfortunately, no federal bankruptcy laws existed at that time, and the state remedies available were "entirely inadequate" to deal with the problems posed by the interstate nature of the railroads. *Id.* at 21-22. Therefore, the railroads turned to the federal courts to help alleviate those deficiencies, and those "[c]ourt-supervised receiverships remained the predominant means of corporate reorganization for about half a century, until federal reorganization laws were enacted during the Great Depression." *Id.* at 22.

Professor Tabb indicated that abuse of those receiverships by "insiders" ultimately led to the enactment of those federal reorganization laws. *Id.* Essentially, "[i]n form, the receivership resulted in the sale of the debtor's assets, with the proceeds distributed to creditors"; however, "[i]n substance, . . . the entire elaborate proceeding often resulted in old management retaining control of the enterprise, and dictating the terms of the sale." *Id.* Thus, while there was some type of market sale, the only real bidders were typically "reorganization committees" or "protective committees" formed by insiders. *Id.* For an in-depth analysis of the problems associated with these equity receiverships, see THOMAS K. FINLETTER, THE LAW OF BANKRUPTCY REORGANIZATION (1939); JOHN GERDES, CORPORATE REORGANIZATIONS (1936); Jacob Trieber, *The Abuses of Receiverships*, 19 YALE L.J. 275, 276-77 (1910).

[23] *See* Northern Pac. Ry. Co. v. Boyd, 228 U.S. 482, 504 (1913) (declaring that

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"[i]f purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company"). *See also* Railroad Co. v. Howard, 74 U.S. (7 Wall.) 392, 409-10 (1868) (noting that stockholders may not receive any portion of new entity's capital stock nor any dividends until all creditors received payment in full of all debts owed them). In *Boyd*, the Court refused to approve a receivership sale, finding that the sale was merely a transfer arranged by the old bondholders and stockholders of the railroad's assets to another entity controlled by those same individuals. *Boyd*, 228 U.S. at 504. The Court declared that such a sale could not be used to "squeeze out" unsecured creditors. John D. Ayer, *Rethinking Absolute Priority After* Ahlers, 87 MICH. L. REV. 963, 972 (1989). As one commentator noted, *Boyd* mandates that "continued shareholder participation in the reorganized debtor creates a presumption of collusion sufficient to permit successor liability." Markell, *supra* note 13, at 81. Similarly, Professors Baird and Jackson surmised that "[t]he basic lesson of *Boyd* . . . is that leaping over an intermediate class triggers special scrutiny." Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 744 (1988). As for the application of the absolute priority rule to these equity receiverships, another bankruptcy scholar acknowledged that

> absolute priority was a perfectly appropriate rule of decision because receivership in theory was a collection device pure and simple. The receiver's job was to assemble the assets of the debtor, sell them, and distribute the proceeds to creditors, with the debtor or its owners being entitled to a portion only after creditors were paid in full.

John C. McCoid, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 187 (1996).

[24] TABB, *supra* note 4, at 857. The *Boyd* Court rejected the shareholders' contention that stock in an insolvent corporation had no value and that, therefore, retention of that stock did not violate this "fixed principle," which courts now refer to as the absolute priority rule. *Boyd*, 228 U.S. at 507-08. Much to the shareholders' chagrin the *Boyd* Court held that it would not allow retention of any interests by shareholders since such interests surely had some value given the shareholders' desire to keep them. *Id.* The Court in *Ahlers* agreed with this logic, noting that it doubted the old equity holders would be seeking these interests if the interests truly lacked any value as claimed by those equity holders. *Ahlers*, 485 U.S. at 207-09.

[25] Although *Case* usually receives recognition as the first decision that fully explained the "new value" exception, the Court set the stage for that pronounce-

"new value" exception to this so-called "fixed principle" of Chapter 11 law, defining the exception as "a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."[26] In *Case*, Justice Douglas declared that

> [i]t is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor . . . . Where [the necessity of receiving funds from old equityholders] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made . . . . [by] the creditor . . . that he is not accorded "his full right of priority against the corporate as-

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ment years before in *Kansas City Terminal.* TABB, *supra* note 4, at 875. In *Kansas City Terminal,* the Court suggested that, in some cases, reorganization would be impossible without shareholder assistance and that, in those instances, it would not be error for a court to alter the rights of creditors and allow for those contributions. Kansas City Terminal Ry. Co. v. Central Union Trust Co. of N.Y., 271 U.S. 445, 455 (1926).

[26] Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 122 (1939). The Court in *Case* examined those railroad equity receivership cases and concluded that the "new value" exception had become so accepted that it was "firmly embedded" within the Bankruptcy Act's "fair and equitable" requirement. *Case,* 308 U.S. at 118-19.

According to current United States Supreme Court Justice Stevens, "Justice Douglas was a preeminent bankruptcy scholar, well known for his views on the dangers posed by management-controlled corporate reorganizations." Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1427 n.3 (1999) (Stevens, J., dissenting). Justice Douglas' work with the Securities and Exchange Commission and on Chapter X of the Bankruptcy Act reflects those concerns he had about the interests of creditors in reorganizations. *Id.* (Stevens, J., dissenting). *See also* Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation,* 73 YALE L.J. 920, 935-37 (1964) (discussing Justice Douglas' involvement with Chapter X of Bankruptcy Act, which sought to "restore the integrity of the reorganization process" to prevent it from being "masterminded behind the scenes by reorganization managers allied with the corporation's management or its bankers"). Based on these concerns Justice Dougals consistently focused on protecting the rights of creditors. John W. Hopkirk, *William O. Douglas—His Work in Policing Bankruptcy Proceedings,* 18 VAND. L. REV. 663, 685 (1965). Examining these views held by Justice Douglas, Justice Stevens concluded that it was "implausible that Congress, in enacting the Bankruptcy Code, intended to be even more strict than Justice Douglas in limiting the ability of debtors to participate in reorganizations." *203 N. LaSalle St. Partnership,* 119 S. Ct. at 1427 n.3 (Stevens, J., dissenting).

sets."[27]

Although purely dicta, the Court made it clear that there existed a "new value" exception to the absolute priority rule.[28] When Congress codified the bankruptcy laws, including the absolute priority rule in 1978, the Code remained silent as to the "new value" exception,[29] thus leading to the controversy that still rages on today.[30]

B. The Enactment of the Bankruptcy Code

Immediately after the enactment of the Code, the majority of courts that addressed the issue of the "new value" exception seemed not really to question the exception's continued vitality, but rather seemed simply to assume the exception continued.[31]

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[27] *Case*, 308 U.S. at 121-22. The plan, however, ultimately failed to satisfy the demands of the Court. *Id.* at 122-23. The Court rejected the contention that the contributions of financial standing and influence in the community were adequate to warrant retention of stock by old equity holders in the new entity. *Id.* The Court concluded that "[t]he rigorous standards of the absolute or full priority doctrine of the *Boyd* case will not permit valueless junior interests to perpetuate their position in an enterprise on such ephemeral grounds." *Id.* at 123.

[28] *Id.* at 121-22. While some have disagreed, it is generally acknowledged that Justice Douglas' statement qualifies as mere dicta. TABB, *supra* note 4, at 875-76. The Supreme Court recently stated as much. *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1417.

[29] *See supra* note 18 and accompanying text.

[30] The presence, and the complexity, of this continuing controversy can be seen in the number of opinions in which courts have refused to declare explicitly whether the exception remains viable. *See* Sunflower Racing, Inc. v. Mid-Continent Racing & Gaming Co. (*In re* Sunflower Racing, Inc.), 226 B.R. 673, 691 (Bankr. D. Kan. 1998); Maloney-Crawford, Inc. v. Huntco Steel, Inc. (*In re* Maloney-Crawford, Inc.), 144 B.R. 531, 537 (Bankr. N.D. Okla. 1992); *In re* Holiday Assocs. Ltd. Partnership, 139 B.R. 711, 716 (Bankr. S.D. Iowa 1992). *See also In re* Woodbrook Assocs., 19 F.3d 312, 320 (7th Cir. 1994) (declining to answer ultimate issue of exception's viability); *In re* Baxter & Baxter, Inc., 172 B.R. 198, 201-02 (Bankr. S.D.N.Y. 1994) (same).

[31] Buffalo Savings Bank v. Marston Enters., Inc. (*In re* Marston Enters., Inc.), 13 B.R. 514, 518 (Bankr. E.D.N.Y. 1981). The *In re Marston Enterprises* court commented that the Code did not, either explicitly or implicitly, revoke the exception and noted that "[t]here is no reason why investors of new capital who happen to be shareholders, whose equity interest as old shareholders is extinguished, should be disqualified from investing in the reorganized corporation, where the contribution is substantial, as is the case herein." *In re Marston Enters.*, 13 B.R.

Not until 1988 in *Northwest Bank Worthington v. Ahlers* did the United States Supreme Court again consider the issue.[32] In *Ahlers*, the Court severely limited debtors' ability to make non-monetary contributions and maintain control of the business following a Chapter 11 reorganization, holding that "yearly contributions of labor, experience, and expertise" did not fall into the category "money or money's worth."[33] Although the

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at 518. *See also In re* Eaton Hose & Fitting Co., 73 B.R. 139, 140 (Bankr. S.D. Ohio 1987) (confirming "new value" plan under which debtor's shareholder paid $16,000, or 15%, of claims of unsecured creditors as such payments were necessary for effective reorganization); *In re* Sawmill Hydraulics, Inc., 72 B.R. 454, 456 (Bankr. C.D. Ill. 1987) (agreeing that shareholders of reorganized business could retain equity interest by investing new capital that exceeded value retained by them, despite failure to fully satisfy all senior creditors); Brown v. Brown's Indus. Unifs., Inc. (*In re* Brown's Indus. Unifs.), 58 B.R. 139, 141 (Bankr. N.D. Ill. 1985) (approving, without analysis, "new value" plan). Likewise, the Sixth Circuit Court of Appeals appeared to presume the Code had not abolished the exception. Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re* U.S. Truck Co.), 800 F.2d 581, 588 (6th Cir. 1986). In that case, the court, without really examining the issue of the present viability of the exception, affirmed the findings of the district court that the capital contributions by the debtor were necessary for a successful reorganization and, therefore, permissible under the exception. *In re U.S. Truck*, 800 F.2d at 590. Several commentators have recognized that these pre-*Ahlers* courts really "gave [no] careful consideration to the possibility that the passage of the Code in 1978 had abolished the exception." White, *supra* note 12, at 14. *See also* Klee, *supra* note 17, at 241 (agreeing with this contention).

Yet, not all courts simply accepted the contention that the Code had no effect on the "new value" exception. *In re* Knutson, 40 B.R. 142, 144 (Bankr. W.D. Wis. 1984). In *In re Knutson*, the debtor proposed to retain sole possession of his farm following reorganization and to provide payment to his creditors through the profits generated from its operation. *In re Knutson*, 40 B.R. at 143. No payments would be made, however, to the unsecured creditors under the plan, and the court found the plan violated the absolute priority rule. *Id.* at 144. *See also In re* Tomlin, 22 B.R. 876, 877 (Bankr. M.D. Ala. 1982) (denying confirmation of plan enabling debtor to retain ownership of both real and personal property of estate); *In re* Huckabee Auto Co., 33 B.R. 132, 141 (Bankr. M.D. Ga. 1981) (rejecting plan under which equity holders kept control of reorganized corporate entity).

[32] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 203 (1988). *See also* Skeel, *supra* note 6, at 225 (indicating *Ahlers* "represents the first major foray by the Supreme Court into this area of bankruptcy since the enactment of the [Code]").

[33] *Ahlers*, 485 U.S. at 203-04. In so ruling, the Supreme Court directly reversed the decision of the Eighth Circuit Court of Appeals. *Id.* at 201. Unlike the Supreme Court, the Eighth Circuit saw no reason to disallow contributions of labor and expertise as those contributions would have led to a successful reorga-

Court in *Ahlers* refused to decide whether the "new value" exception had survived the enactment of the Code,[34] the Court did find that the proposed "sweat labor"[35] contributions of the debtors "'[had] no place in the asset column of the balance sheet of the new [entity]'" and, therefore, could not constitute "new value."[36] The Court reasoned that such contributions

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nization just as an infusion of cash would have. *Id.* The Supreme Court stressed, however, that, in *Case*, the Court denied confirmation of a plan based upon similar "sweat labor" contributions and added that nothing in the Code suggested an intent by Congress to broaden the exception from pre-Code practice. *Id.* at 204-06.

[34] *Id.* at 203 n.3. As courts often do, the Supreme Court here refused to decide an issue that it did not need to answer in order to reach a conclusion in the case. *Id.* The Court commented that, even if the exception still existed, the plan in question did not satisfy the exception's requirements. *Id.*

[35] "Sweat labor" is closely connected to "sweat equity," which has been defined as the "equity created in property through labor of the owner in making improvements to the property." BLACK'S LAW DICTIONARY 1448 (6th ed. 1990).

[36] *Ahlers*, 485 U.S. at 204 (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 122-23 (1939)). Other courts have similarly found "sweat labor" contributions do not satisfy the "money or money's worth" requirement. *In re* Drimmel, 108 B.R. 284, 290 (Bankr. D. Kan. 1989). In *In re Drimmel*, the court rejected the debtor's proposal to supply labor, to donate exempt property, and to arrange for a deferral of attorneys' fees as insufficient to constitute "capital contributions." *In re Drimmel*, 108 B.R. at 285-86. *See also In re* Woodmere Investors Ltd. Partnership, 178 B.R. 346, 363 (Bankr. S.D.N.Y. 1995) (following *Ahlers* in deciding "sweat equity" is not "money's worth"); *In re* Capital Ctr. Equities, 144 B.R. 262, 268-69 (Bankr. E.D. Pa. 1992) (finding plan to provide "free management services" and commitment to reorganized business insufficient to satisfy "new value" exception).

At least one commentator has suggested that "[t]here is at least a colorable argument" that the Supreme Court "was wrong" in reversing the Eighth Circuit's decision in *Ahlers*. Skeel, *supra* note 6, at 228. Skeel contended that in sole proprietorships and other closely held corporations,

> [t]he same individual or individuals may both own the stock and manage the business. Moreover, continuity of management may be especially important to small companies, whose primary asset is often the ideas and entrepreneurial skills of their manager-owners. Because of the importance of managerial skills to these companies, contributions of managerial services are arguably more valuable than contributions of cash. For them, labor contribution may seem appropriate so long as the danger that absolute priority will be undermined is minimized.

Id. See also Note, *The Proposed Bankruptcy Act: Changes in the Absolute Priority Rule for Corporate Reorganizations*, 87 HARV. L. REV. 1786, 1817-20 (1974) (suggesting that "sweat labor" contributions should be permitted so long as old equity holders contribute services equivalent in value to interests retained).

could not "be exchanged in any market for something of value to the creditors today."[37] Based on this restrictive view of the "new value" exception the Court reversed the Eighth Circuit's

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Before *Ahlers* other bankruptcy scholars also contended that, at least in some cases, contributions of labor and effort should be allowed as substitutes for contributions of cash. Nimmer, *supra* note 4, at 1074. Professor Nimmer, however, cautioned against a "loosely applied 'sweat equity' rule" as that "would be tantamount to permitting the debtor to retain ownership in all cases." *Id.* at 1076. Instead, Professor Nimmer encouraged courts to permit only those debtors "who [were] willing to make a valuable best effort" to take advantage of the exception. *Id.* Professor Nimmer concluded that "[t]his requires a tight standard that demands real risk and sacrifice by the individual and real protection to the creditors. As a consequence, the 'sweat equity' rule is and should remain a special exception, rather than a general, easily available alternative." *Id.* While application of this exception "entails a risk" of failure, Professor Nimmer argued that debtors should be given this opportunity to succeed. *Id.* at 1077.

[37] *Ahlers*, 485 U.S. at 204. Courts have consistently refused to confirm plans in which the old equity holder proposed to infuse new capital contributions that were not in the form of money or something with immediate cash value. *In re* Hendrix, 131 B.R. 751, 753 (Bankr. M.D. Fla. 1991). There the court rejected a plan under which the debtor's wife promised to pay $800 a month to fund the reorganization. *In re Hendrix*, 131 B.R. at 753. The court declared that "the contribution cannot be a future contribution, it must be present, taking place at or before the effective date of the plan." *Id. See also* Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (*In re* Tucson Self-Storage, Inc.), 166 B.R. 892, 899 (B.A.P. 9th Cir. 1994) (rejecting proposed plan in which alleged new capital was not "present contribution of new value" but rather addition of another liability to balance sheet that would be paid for in future with "accumulated earnings of reorganized debtor); *In re* 47th & Belleview Partners, 95 B.R. 117, 119 (Bankr. W.D. Mo. 1988) (denying confirmation of "new value" plan that allowed debtor's general partner to retain interest in reorganized business in return for promise, by means of personal guarantee, to ensure full payment to creditors should there be future shortfalls in company's funds); *In re* Future Energy Corp., 83 B.R. 470, 499 (Bankr. S.D. Ohio 1988) (holding promise to make future payments did not qualify as "new value" contribution). Like those courts a Florida bankruptcy court would not approve a "new value" plan that allowed the equity holder to offer future profits as a contribution. *In re* Maropa Marine Sales Serv. & Storage, Inc., 90 B.R. 544, 546 (Bankr. S.D. Fla. 1988). There, the court turned down the plan, declaring that "[a]part from the limited new capital referred to above, which merely assures the first year's survival, this 20-year plan rests entirely on future profits. I have not been persuaded that the debtor's future prospects can support this plan." *In re Maropa Marine*, 90 B.R. at 546. *See also In re* Bolton, 188 B.R. 913, 917 (Bankr. D. Vt. 1995) (holding that promise of future payments cannot constitute "new value"); *In re* Gramercy Twins Assocs., 187 B.R. 112, 127 (Bankr. S.D.N.Y. 1995) (same); *In re Woodmere Investors*, 178 B.R. at 363 (same).

approval of the debtor's reorganization plan.[38]

Some commentators felt *Ahlers* had eliminated, or had at least cast a great cloud of doubt upon, the "new value" exception.[39] One bankruptcy court took an extreme view of *Ahlers*, stating that in *Ahlers* the Court implicitly required that "the capital contribution [by the equityholders had to] result in a 100% pay out of unsecured creditors."[40] The court in *In re Rudy Debruycker Ranch* added that, in regard to the existence of the "new value" exception, "the easy answer is that inferred by the *Ahlers* case, namely, there are no exceptions to the absolute priority rule as codified by the 1978 Code."[41]

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[38] *Ahlers*, 485 U.S. at 210.

[39] Miscioscia, *supra* note 7, at 921. One commentator suggested that "by refusing to affirm or deny the new value exception's existence, and in depicting uncertainty in the lower courts, the Court [in *Ahlers*] did in fact comment on the exception's continuing vitality" in such a manner as to imply its death. *Id.* at 924. *See also* Richard E. Coulson, *"New Value" and the Absolute Priority Rule in Chapter 11 Cramdowns*, 48 CONSUMER FIN. L.Q. REP. 220, 222 (1994) (declaring that some have viewed *Ahlers* as "an open invitation to challenge the very propriety of new value plans"). Other scholars have stated that "[a]lthough no direct support for the elimination of the new value exception to the absolute priority rule can be garnered from the *Ahlers* case," the case, along with other factors, creates a strong argument against the exception's continued usage. Powlen & Wuhrman, *supra* note 12, at 316. *See also* Marcus, *supra* note 6, at 392 (declaring that "[a]lthough the [*Ahlers*] Court dodged the question of the vitality of the new value exception, it clearly indicated that no court should simply assume that the exception survived enactment of the Code"); Ayer, *supra* note 23, at 1011-12 (maintaining that *Ahlers* signalled death of "new value" whether or not Justice White intended it to do so). At a minimum, *Ahlers* "has given notice to debtors and creditors alike that the continuing availability and usage of the new value exception to the absolute priority rule may be subject to dispute." Powlen & Wuhrman, *supra* note 12, at 314.

At least one commentator, however, has been critical of the *Ahlers* decision, suggesting that "Congress did not intend so rigorous a standard to be applied to small business debtors nor . . . intend to question the continued existence of the new value exception." Brinkman, *supra* note 15, at 372.

[40] *In re* Rudy Debruycker Ranch, 84 B.R. 187, 190 (Bankr. D. Mont. 1988).

[41] *In re Rudy Debruycker Ranch*, 84 B.R. at 190. Some commentators have responded negatively to the *In re Rudy Debruycker Ranch* decision, complaining that the court there "seemed to ignore the Supreme Court's admonition that its opinion in *Ahlers* was not to be read as either approving or disapproving of the application of the new value exception under the Code." Powlen & Wuhrman, *supra* note 12, at 316.

One district court had a view similar to that of the court in *In re Rudy*

After the *Ahlers* decision, some courts, although not expressly holding that the "new value" exception did not survive the codification of the absolute priority rule, refused to confirm plans under which the debtor proposed to infuse new capital in return for continued control of the reorganized company.[42] The

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Debruycker Ranch, stating that it "believe[d] that the plain language of § 1129(b)(2)(B) and the intent of Congress preclude[d] the existence of any new value exception to the absolute priority rule." Piedmont Assoc. v. Cigna Property & Cas. Insur. Co., 132 B.R. 75, 79 (Bankr. N.D. Ga. 1991). *See also In re* East, 57 B.R. 14, 17 (Bankr. M.D. La. 1985) (declaring that "the jurisprudence apparently unanimously holds that if the Debtor retains any property, even control or the potential for future earnings," absolute priority rule has been violated and, therefore, denying confirmation of "new value" plan). Thus, the *Piedmont* court refused to confirm a plan that allowed an old partner of the debtor to retain a 20% interest in the reorganized company in return for an infusion of capital on the ground that the plan failed to provide full satisfaction to all creditors in violation of the absolute priority rule. *Piedmont*, 132 B.R. at 79.

[42] Coltex Loop Cent. Three Partners v. BT/SAP Pool C Assocs. (*In re* Coltex Loop Cent. Three Partners), 138 F.3d 39, 46 (2d Cir. 1998). While the court there did not explicitly rule that the exception's viability had been eliminated by the Code's enactment, it came very close to doing so. *In re Coltex Loop Cent. Three Partners*, 138 F.3d at 43-46. First, the court suggested that the words "on account of" seemed straightforward and could only mean that the Code terminated the existence of any "new value" exception. *Id.* at 43. The court noted that Congress could have easily included modifiers such as "only," "solely," or "primarily" in § 1129(b), and thereby alter the meaning of "on account of," but that Congress took no such action. *Id.* Second, the court reasoned that, due to the significant differences in the practices utilized before and after the enactment of the Code, those old practices could not be simply "imported in toto" into current practice absent a clear indication from Congress that such importation was desired. *Id.* Based on these views the court rejected a "new value" plan without fully exploring whether the proposal satisfied the exception's five traditional requirements. *Id.* at 44. *See infra* notes 50-55 and accompanying text. Rather, the court, applying this rigid view of the absolute priority rule, declared that the old equity holders would not have received these interests but for their prior status and denied confirmation. *In re Coltex Loop Cent. Three Partners*, 138 F.3d at 46.

Recently, despite the majority trend in the courts of abandoning the approach of *In re Coltex Loop Cent. Three Partners*, a Connecticut bankruptcy court followed the Second Circuit's reasoning and rejected a "new value" plan. *In re* Dwellco I Ltd. Partnership, 219 B.R. 5, 11 (Bankr. D. Conn. 1998). Concerned that the capital contributed would go only to repairs rather than to pay the claims of the unsecured creditors, the court refused to grant confirmation. *In re Dwellco I*, 219 B.R. at 11-12. Additionally, the court held that the debtors' proposal to allow outsiders to make an equity contribution in the debtors' stead, when that proposal was made at a confirmation hearing at which only a few individuals were present, did not qualify as "a true solicitation of bids in an open market

Second Circuit Court of Appeals in *In re Coltex Loop Central Three Partners* followed the Fourth Circuit's approach,[43] holding that "if old equity's new interest under the [reorganization] plan results in any significant way from its old status, the plan may not be confirmed."[44] The court noted that "it is apparent

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place." *Id.* at 12.

[43] Travelers Ins. Co. v. Bryson Properties (*In re* Bryson Properties), 961 F.2d 496, 504 (4th Cir. 1992). In *In re Bryson Properties*, the court, faced with a plan allowing the debtor's partners to retain their interests in the partnership even though one creditor was not paid in full, refused to make an outright declaration as to the existence of the "new value" exception. *In re Bryson Properties*, 961 F.2d at 503-04. The plan further provided that, should the mortgaged property—the debtor's sole asset—be sold, the partners would receive the amount they contributed in new capital before the unpaid creditor received anything. *Id.* at 503. In rejecting the proposal, the court said:

> [T]he equityholders have given themselves not only the exclusive right to contribute, but the right to return of their new capital prior to [the creditor's] recovery of its unsecured claim . . . . In effect, [the equityholders] were allowed to 'buy' the property without exposing it to the market or otherwise allowing any other party . . . the opportunity to bid.

Id. at 504. The court deemed such exclusive rights "property" under 11 U.S.C. §§ 1129(b)(2)(B)(ii) and refused to accept the plan. *Id.* Similarly, a Minnesota bankruptcy court has held that

> [a] special opportunity or right afforded to members of a class of equity security holders to retain or acquire an equity position in a reorganized debtor through a new cash contribution under a plan is, by its very nature, the opportunity or right to receive or retain property on account of the prepetition interest held. When the opportunity is fulfilled, or the right exercised, clearly, the interest is retained or received on account of the prior interest, even though new consideration is paid in the transaction.

In re Lumber Exch. Ltd. Partnership, 125 B.R. 1000, 1008 (Bankr. D. Minn. 1991), *aff'd*, 134 B.R. 354, 358 (D. Minn. 1991). *In re Bryson Properties* seems to imply that, even "if the new value exception does still exist under the Bankruptcy Code, it is narrow in scope." Basil, *supra* note 13, at 291 n.8.

[44] *In re Coltex Loop Cent. Three Partners*, 138 F.3d at 43. One legal scholar expressed agreement with the view espoused in the *In re Coltex Loop Cent. Three Partners* case, arguing that

> [t]o the extent that current equity holders are able to retain interests in existing reorganized corporations because only they can propose plans under 1121's exclusivity rule or because of insiders' knowledge of the reorganized corporation, they *are* receiving a benefit "on account of such junior claim or interest." It is their very status as the debtor . . . that

that the [old equity holders] could not have gained their new position but for their prior equity position" and rejected the proposed plan.[45]

Numerous courts, however, have consistently disagreed with those decisions, expressly holding that the "new value" exception had not been eliminated by the enactment of the Code.[46] The Ninth Circuit Court of Appeals pointed out that

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> entitles them to the exclusivity period (holding competitors at bay) and that grants them the knowledge sufficient to make a plan.

White, *supra* note 12, at 8.

Of course, others have disputed that contention and have commented that a fresh capital contribution "is not an exception to anything; it is simply an offer to purchase the residual value of the debtor [and as] such, the focus of the court should be on the adequacy of the offer." MICHAEL J. HERBERT, UNDERSTANDING BANKRUPTCY 345 (1995).

[45] *In re Coltex Loop Cent. Three Partners*, 138 F.3d at 44. The Second Circuit said that, while the old equity holders could have freely purchased equity interests in the new entity on the open market, those equity holders could not simply retain those interests without allowing outside competition. *Id.* at 44-45. The court found that one could not help but conclude that the old equity holders had received a bargain—even if only a minimal one—because of their status as old equity holders. *Id.* at 45.

The court went on to state that, even were the "new value" exception still viable, the plan in question could not be confirmed because it failed the "necessary" prong. *Id.* Taking an extreme view of the "necessary" requirement, the court suggested that old equity holders had not only to establish the need for the contribution, but also prove that no other source would infuse the capital. *Id.* Here, the debtor could not satisfy that two-prong test as BT/SAP, to whom the debtor's loan had been assigned as a part of a portfolio purchase from the Bank of Boston, proposed a competing plan. *Id.* at 44. This two-prong approach to the "necessary" component has been promoted by at least one bankruptcy scholar. Michael H. Strub, Jr., *Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single-Asset Paradigm of* Bonner Mall, 111 BANKING L.J. 228, 243 (1994).

[46] Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (*In re* Bonner Mall Partnership), 2 F.3d 899, 907 (9th Cir. 1993). *See also* Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (*In re* Tucson Self-Storage, Inc.), 166 B.R. 892, 899 (B.A.P. 9th Cir. 1994) (following Ninth Circuit in "recogniz[ing] the new value exception"). A host of other courts have arrived at the same conclusion as the *In re Bonner Mall Partnership* court. *In re* Dowden, 143 B.R. 388, 392 (Bankr. W.D. La. 1989). *See also In re* Bjolmes Realty Trust, 134 B.R. 1000, 1006 (Bankr. D. Mass. 1991) (holding that "[r]eceipt or retention of stock in consideration of a fresh capital contribution may be considered to be 'on account of' the contribution and not the pre-existing stock interest"); *In re* Tallahassee Assocs., 132 B.R. 712, 717 (Bankr. W.D. Pa. 1991) (finding that *Ahlers* did not prohibit application of

the Code did not directly prohibit confirmation of "new value" plans,[47] found no intent by Congress in its failure to include

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"new value" exception, that legislative history of Code also did not indicate abolition of exception, and that application of exception permitted courts to override inflexibility of absolute priority rule); *In re* 222 Liberty Assocs., 108 B.R. 971, 983-84 (Bankr. E.D. Pa. 1990) (considering exception still viable). A number of district courts have adopted this view of the continued existence of the "new value" exception. *See* BT/SAP Pool C Assocs. v. Coltex Loop Cent. Three Partners, 203 B.R. 527, 534 (Bankr. S.D.N.Y. 1996), *aff'd, In re Coltex Loop Cent. Three Partners*, 138 F.3d at 43-46 (stating that "on account of" phrase in Code did not altogether prohibit "new value" exception). *See also* Beal Bank v. The Way Apartments (*In re* The Way Apartments), 201 B.R. 444, 455 (Bankr. N.D. Tex. 1996) (declaring "new value" exception remained viable after codification of absolute priority rule); *In re* Sovereign Group 1985-27, Ltd., 142 B.R. 702, 707-08 (Bankr. E.D. Pa. 1992) (same).

An interesting situation arises when the debtor himself, rather than a shareholder of a debtor corporation, attempts to infuse "new value" contributions and maintain control of the reorganized entity. *In re* Rocha, 179 B.R. 305, 307-08 (Bankr. M.D. Fla. 1995). What has troubled some courts when presented with such a situation has been the requirement "that the new value must come from an 'outside' source, meaning it cannot come from the Debtor himself." *In re Rocha*, 179 B.R. at 307. In the words of the *In re East* court, "[i]t is easier in a corporate context to consider the concept of the injection of outside capital; when an individual is involved it is difficult to imagine the source of such funds: perhaps a relative or friend might make a gift; perhaps there are other sources." *In re East*, 57 B.R. at 19. While the *In re Rocha* court recognized the possibility of an individual debtor infusing new capital and retaining interests, it refused confirmation of such a plan where the debtor's contribution came not from a friend or relative but from the revenues of his rental property. *In re Rocha*, 179 B.R. at 309. *See also In re* Cipparone, 175 B.R. 643, 645 (Bankr. E.D. Mich. 1994) (rejecting plan providing for infusion of future earnings and income tax returns by debtor on ground that contribution did not come from "outside" source); *In re* Pecht, 53 B.R. 768, 771-72 (Bankr. E.D. Va. 1985) (denying confirmation but stating "new value" exception was applicable in sole proprietorship context).

[47] *In re Bonner Mall Partnership*, 2 F.3d at 907. The Ninth Circuit ruled that the statute in question contained no hint of ambiguity. *Id.* at 908. Based on the plain language of the Code the court, therefore, could not find anything that might suggest the exception had been eliminated. *Id.* Although the court conceded that "in some larger sense the reason that the former owners receive new equity interests in reorganized ventures is that they are former owners," the court went on to state:

> [I]t is also true that in new value transactions old equity owners receive stock in exchange for the additional capital they invest. Causation for any event has many and varied levels. Here, the answer to the meaning of the phrase "on account of" lies in the level of causation Congress had in mind when it prohibited old equity owners from receiving property

the exception as a factor to consider under the "fair and equitable" doctrine to eradicate the exception[48] and noted that application of the exception was entirely "consistent with the structure and underlying policies of Chapter 11."[49] So long as the old equity holder met the requirements of adding to the reorganized debtor capital that was "1) new,[50] 2) sub-

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> "on account of" their prior interests. A reading of the full text of section 1129(b)(2)(B)(ii) makes it clear that what Congress had in mind was direct or immediate causation rather than a more remote variety, and that it did not intend to prohibit persons who receive stock because they have provided new capital from becoming participants in the reorganized debtor simply because they were also owners of the original enterprise.

Id. at 909. This reading of the Code has not gone without harsh criticism. *See* Charles R. Sterbach, *Absolute Priority and the New Value Exception: A Practitioner's Primer*, 99 COM. L.J. 176, 183 (1994) (claiming that Ninth Circuit's ruling ignores fact that rationale for exception has been emasculated by the [Code]).

[48] *In re Bonner Mall Partnership*, 2 F.3d at 907-08. Based on certain principles of statutory interpretation the court rejected this argument, noting that the failure to include this exception in the Code did not indicate, in any degree, an intent by Congress to eradicate it. *Id.* at 913. *See infra* note 62 for a discussion of those principles of statutory construction and interpretation. Without a clear signal from Congress to indicate otherwise the court held that any changes created by the Code from pre-Code reorganization practice, regardless of the substantiality of those changes, did not mean Congress desired to eliminate a useful component of pre-Code practice. *In re Bonner Mall Partnership*, 2 F.3d at 913-15.

[49] *Id.* at 908. As the court noted, Chapter 11's two primary goals are "to permit successful rehabilitation of debtors" and "to maximize the value of the estate." *Id.* at 915. Application of the "new value" exception promotes both of those policies. *Id.* On the one hand, the new capital, which often is unavailable from other sources, enables the debtor to reorganize, while, on the other hand, the contribution increases the estate value and provides the debtor capital to fund its plan and pay creditors. *Id. See also* Kuney & Epp, *supra* note 7, at 213 (stating that justification for exception "may be found in the modern bankruptcy law's preference for reorganization over liquidation"). The *In re Bonner Mall Partnership* court rejected the argument that the exception impermissibly permitted old equity holders to retain their position at a bargain price, noting that the Supreme Court had consistently favored reorganizations over the interests of creditors. *In re Bonner Mall Partnership*, 2 F.3d at 916. *See* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984); Toibb v. Radloff, 501 U.S. 157, 163-64 (1984). Additionally, the court suggested that if other courts rigorously applied the exception's requirements, no creditor could successfully contend that old equity holders had received a bargain. *In re Bonner Mall Partnership*, 2 F.3d at 916-17.

[50] *Id.* at 908. To satisfy the "new" requirement "the existing equity holders must contribute something to the Debtor that does not already belong to the

stantial,[51] 3) money or money's worth,[52] 4) necessary for suc-

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Debtor or to which the Debtor is not already entitled." *In re* S.A.B.T.C. Townhouse Ass'n, Inc., 152 B.R. 1005, 1010 (Bankr. M.D. Fla. 1993). In that case, the equity holder attempting to maintain ownership of the reorganized entity characterized escrow funds from previous assessments of members of the townhouse association as "fresh capital," but the court declared it was "not fooled." *In re S.A.B.T.C. Townhouse Ass'n, Inc.*, 152 B.R. at 1010. Rather, the debtor already had a right to those funds, and the court rejected the proposed plan. *Id.* Likewise, a Louisiana bankruptcy court denied confirmation of a plan because the plan failed the "new" requirement. *In re* Batten, 141 B.R. 899, 908 (Bankr. W.D. La. 1992). The debtor there proposed to obtain additional funds that would be inserted into the new business, but the court rejected the plan, commenting that the "debtors have confused refinancing with a new capital contribution": "Debtors must do more than simply throw money on the table from refinancing." *In re Batten*, 141 B.R. at 908 n.7. *See also In re* Yasparro, 100 B.R. 91, 98 (Bankr. M.D. Fla. 1989) (finding proposal to contribute new capital in form of promissory notes failed to satisfy "new" requirement as debtor was merely making future contribution, not present one).

[51] *In re Bonner Mall Partnership*, 2 F.3d at 908. In order to qualify as "substantial," courts have ruled that

> new value must be a present contribution rather than a promise to pay in the future; it must be freely tradeable in the market by the debtor; and it must be an asset in the accounting sense. The contributor must be bearing a *new* economic risk—it is not enough that the contributor . . . is simply continuing an existing risk, satisfying an existing risk, or only changing the form of an existing risk.

In re Creekside Landing, Ltd., 140 B.R. 713, 717 (Bankr. M.D. Tenn. 1992). In one case, the old equity holders attempted to utilize the "new value" exception and offered to contribute $5 million in new funds, along with $20 million in subordinated debt. *In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 749 (Bankr. N.D. Tex. 1988). Much to the chagrin of the old equity holders in that case the court turned down the proposed plan on the ground that the contribution was not substantial. *In re Kendavis Indus. Int'l, Inc.*, 91 B.R. at 749. Rather, the court found the contribution was a "drop in the bucket" compared to the $500 million already owed. *Id. See also In re* Pullman Constr. Indus. Inc., 107 B.R. 909, 950 (Bankr. N.D. Ill. 1990) (denying confirmation of plan that would have discharged only around four percent of debt but enabling equity holder to retain 60% equity interest in reorganized business). Mississippi courts have ordered that the contribution must be more than a "gratuitous, token cash infusion proposed primarily to buy cheap financing." *In re* Treasure Bay Corp., 212 B.R. 520, 544 (Bankr. S.D. Miss. 1997) (quoting *In re* Snyder, 967 F.2d 1126, 1131 (7th Cir. 1992)).

A few courts have, in defining this requirement, designated two factors as significant in determining the substantiality of a contribution. *In re* Wynnefield Manor Assocs., 163 B.R. 53, 56-57 (Bankr. E.D. Pa. 1993). Those factors are: "(1) whether the proposed payment represents the partner's best efforts; and (2) the amount of the contribution, or the percentage of the return on their claims, projectcessful reorganization,[53] and 5) reasonably equivalent[54] to the

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ed to creditors." *In re Wynnefield Manor Assocs.*, 163 B.R. at 57. Applying the first factor, the court felt the old equity holders had not made their best efforts as they owned numerous other parcels of valuable real estate but only proposed to contribute $25,000 to maintain control of land worth nearly $590,000. *Id.* The plan also failed to satisfy the second factor since only a minimal portion of the capital infusion was to go to pay creditors's claims, while the majority of the capital was to be used for repairs to the property, which the court noted only served to "preserve and enhance the value of the interest to be retained by the contributing principals." *Id. See also In re* One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 708 (Bankr. S.D.N.Y. 1993) (rejecting plan that allocated only minor percentage of new capital to payment of creditors' claims).

[52] *In re Bonner Mall Partnership*, 2 F.3d at 908. Courts have consistently denied confirmation of plans in which the old equity holders offered "sweat labor" or "sweat equity" as the capital infusion. *See supra* notes 36-37 and accompanying text. Similarly, there must be a present infusion of money or money's worth; the promise of future funds will not suffice. Carson Nugget, Inc. v. Green (*In re* Green), 98 B.R. 981, 982 (B.A.P. 9th Cir. 1989). In *In re Green* the court objected to a reorganization plan that enabled the debtor "to apply for up to 50% of any recovery from a lawsuit being pursued against the [debtor's motel, casino, and restaurant]" but failed to "assure payment in full to unsecured creditors." *In re* Green, 98 B.R. at 982. The court reversed the trial court's confirmation of the plan because the plan provided only the promise of future moneys and not present ones. *Id.*

[53] *In re Bonner Mall Partnership*, 2 F.3d at 908. Courts have consistently required that the money contributed must actually be necessary for successful reorganization to satisfy the "new value" exception requirements. Oxford Life Ins. Co. v. Tucson Self-Storage, Inc. (*In re* Tucson Self-Storage, Inc.), 166 B.R. 892, 899 (B.A.P. 9th Cir. 1994). The court there expressed that "[m]erely using the [contributed] funds to pay priorities and administrative claimants is not . . . sufficient" to enable the funds to be characterized as "necessary." *In re Tucson Self-Storage, Inc.*, 166 B.R. at 899. However, the old equity holders in another case fulfilled this requirement. *In re* Dean, 166 B.R. 949, 956 (Bankr. D.N. Mex. 1994). There, the court found the plan necessary "because the reorganized Debtor [would] have to make certain tenant improvements in order to renew its lease with BDM, or, if necessary, attract new tenants to the building." *In re Dean*, 166 B.R. at 956. *See also In re* Resorts Int'l, Inc., 145 B.R. 412, 482-84 (Bankr. D.N.J. 1990) (permitting old equity holder to retain 21.5% of capital stock in consideration of payment of $26 million on grounds that money "was necessary to the company going forward to meet the projections in the business plan" and that money could not "be obtained from other sources").

The purpose of the "necessary" requirement has been summed up as follows: Without the requirement the courts "would allow the capital infusion exception to swallow the absolute priority rule, and the exception could be used merely as a device to retain an equity interest in the venture." *In re* Mortgage Inv. Co. of El Paso, Tex., 111 B.R. 604, 620 (Bankr. W.D. Tex. 1990). As opposed to the plan in *In re Dean*, the proposal in *In re Mortgage Investment Co.* did not meet this

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requirement. *In re Mortgage Inv. Co.*, 111 B.R. at 620. Rather, "the sole purpose for [the equity holder] to infuse capital [was] to retain control of the equity ownership under the Plan without the payment in full of a dissenting creditor class." *Id.* That left the court with "serious doubts as to the supposed benefits that the capital infusion will afford the Debtors other than paying off Class VI and VII claimants" and led to the rejection of the plan. *Id.*

Some courts have indicated that a contribution may be considered necessary only if there exists a reasonable possibility of a successful reorganization as a result of that infusion. Penn Mutual Life Ins. Co. v. Woodscape Ltd. Partnership (*In re* Woodscape Ltd. Partnership), 134 B.R. 165, 168 (Bankr. D. Md. 1991). There, the sole asset was a single parcel of real estate, and the court, in approving the plan, held that "there exists no possibility of reorganization . . . without it." *In re Woodscape*, 134 B.R. at 168. The United States Supreme Court has observed that "[w]hat this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*." United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375-76 (1988). *See also In re* Montgomery Court Apartments of Ingham County, Ltd., 141 B.R. 324, 331 (Bankr. S.D. Ohio 1992) (requiring plan's proponent to prove plan had reasonable likelihood of success); *In re* E.I. Parks No. 1, 122 B.R. 549, 558 (Bankr. W.D. Ark. 1990) (same). Congress codified the feasibility requirement in 11 U.S.C. § 1129(a)(11), prohibiting confirmation unless it "is not likely to be followed by the liquidation, or the need for further financial reorganization." 11 U.S.C. § 1129(a)(11) (1994). Most courts agree that the test of whether the plan can be accomplished is a "practical" one. Clarkson v. Cooke Sales & Service Co. (*In re* Clarkson), 767 F.2d 417, 420 (8th Cir. 1985). Yet, while courts demand more than a showing of mere hopes and desires, success need not be absolutely certain for the plan to gain approval. Prudential Ins. Co. of Am. v. Monnier Bros. (*In re* Monnier Bros.), 755 F.2d 1336, 1341 (8th Cir. 1985). *See also* Pizza of Hawaii, Inc. v. Shakey's, Inc. (*In re* Pizza of Hawaii, Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985) (stating purpose of feasibility test is to protect against visionary or speculative plans); Beal Bank v. The Way Apartments (*In re* The Way Apartments), 201 B.R. 444, 453 (Bankr. N.D. Tex. 1996) (stating proponent must prove, by clear and convincing evidence, that plan will succeed); *In re* Lakeside Global II, Ltd., 116 B.R. 499, 507 (Bankr. S.D. Tex. 1989) (declaring "sincere and honest" intentions insufficient to establish feasibility). In one case, the debtor satisfied this factor even though the plan of reorganization relied upon his future employment in a position in which he earned $460,000 annually. *In re* Harman, 141 B.R. 878, 884 (Bankr. E.D. Pa. 1992).

Additionally, courts have ruled that the Code prohibits confirmation of plans that allow shareholders to retain equity interests for purposes other than "legitimate business reasons." *In re Bonner Mall Partnership*, 2 F.3d at 909. Essentially, the court, in making such a determination, is attempting to decide "whether old equity is unjustifiably attempting to retain its corporate ownership powers in violation of the absolute priority rule or whether there is a genuine and fair exchange of new capital for an equity interest." *Id.* at 909. One court set out the following list of factors to consider in making this decision: "(1) adequacy of the value or interest received,"[55] the court concluded an old equity

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capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matters." *In re* Landmark at Plaza Park, Ltd., 7 B.R. 653, 659 (Bankr. D.N.J. 1980). *See also In re* Toy & Sports Warehouse, Inc., 37 B.R. 141, 151 (Bankr. S.D.N.Y. 1984) (citing same list as guideline for making determination of feasibility). Further, "[a]vailability of prospective credit, both capital and trade, adequacy of funds for equipment replacement and provisions for adequate working capital are other factors examined." *In re Resorts Int'l*, 145 B.R. at 479.

[54] *In re Bonner Mall Partnership*, 2 F.3d at 908. One demand courts have repeatedly placed upon all old equity holders has been that the contribution must be "reasonably equivalent" to the interest retained, or, in other words, "equal to or exceeding the value of the retained interest [by] the [debtor]." Coones v. Mutual Life Ins. Co. of N.Y., 168 B.R. 247, 255 (Bankr. D. Wyo. 1994). In *In re Aztec Co.*, the proposed reorganization plan, which called for any equity holder wishing to retain equity interests in the reorganized business to invest a portion of a $500,000 contribution for apartment building repair bills, met this requirement and received approval from the court. *In re* Aztec Co., 107 B.R. 585, 588 (Bankr. M.D. Tenn. 1989). The *In re Aztec Co.* court realized that many costly repairs would be necessary to reorganize the apartment complex business successfully and confirmed the plan because the new investment was "far in excess of the value of the interests that the venturers [would] retain in the debtor." *In re Aztec Co.*, 107 B.R. at 588. *See also In re* SM 104 Ltd., 160 B.R. 202, 229-30 (Bankr. S.D. Fla. 1993) (finding that, based on all facts in evidence, $200,000 contribution appeared reasonably equivalent to retained equity interests and, therefore, approving "new value" plan); *In re* Henke, 90 B.R. 451, 456 (Bankr. D. Mont. 1988) (confirming plan that provided creditors $680,000 which far exceeded unsecured principal debt). Recently, a Tennessee bankruptcy court suggested other courts, in determining whether contributions satisfy this requirement, should consider the following factors: "[c]apitalization of future earnings," "[t]he likelihood of return on the new investment and probable future risks," "[t]he likelihood of future increases in the value of the assets," "[b]enefits that are personal to an investor," "[d]ividends, distributions, or even a future salary," potential tax benefits, and "[p]lan payments to creditors that release the investor from liability such as guaranties." *In re* Creekside Landing, Ltd., 140 B.R. 713, 718 (Bankr. M.D. Tenn. 1992).

[55] *In re Bonner Mall Partnership*, 2 F.3d at 908. Essentially, every court to consider the matter has concurred that all five factors must be satisfied in order to have a "new value" plan confirmed. *In re* Capital Ctr. Equities, 144 B.R. 262, 268 (Bankr. E.D. Pa. 1992). *See also* Berkley Fed. Bank & Trust v. Sea Garden Motel & Apartments (*In re* Sea Garden Motel & Apartments), 195 B.R. 294, 301 (Bankr. D.N.J. 1996) (indicating each factor must be found to warrant acceptance of "new value" plan); *In re Dean*, 166 B.R. at 955 (same); *In re Batten*, 141 B.R. at 908 (same). Courts strictly apply these requirements and will not invoke the exception unless the old equity holder's plan passes a rigorous review. *In re Sea Garden*, 195 B.R. at 268. *See also In re Tucson Self-Storage, Inc.*, 166 B.R. at 899 (placing burden upon old equity holder to prove each element has been fulfilled);

holder could have a "new value" plan confirmed and remanded the case to the bankruptcy court with instructions to make these determinations.[56] Following the lead of the Ninth Circuit Court of Appeals, the Seventh Circuit expressly declared that "the new value corollary remains a part of our bankruptcy jurisprudence."[57] In doing so, the Seventh Circuit adopted a

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In re S.A.B.T.C. Townhouse Ass'n, Inc., 152 B.R. at 1008 (holding that equity holder must prove, by clear and convincing evidence, all five mandates have been met); *In re* SLC Ltd. V, 137 B.R. 847, 856 (Bankr. D. Utah 1992) (noting that courts rigorously test proposed plan to determine if all elements are satisfied). One court applying these principles rejected a "new value" proposal, stating that

> unfortunately, Debtor has presented no evidence whether this proposed contribution of $7,000.00 to Debtor's capital is substantial or exceeds the value of the retained interest in the corporation. We concede that a review of the debtor's balance sheet would reveal a negative net-worth, and thus, allow a conclusion that the shareholder's retained interest is worth less than nothing; however this proposition does not recognize that the retained interest of a shareholder has a value not measured in terms other than net-worth. What that value is has not been established by the debtor.

In re Ag Consultants Grain Div., Inc., 77 B.R. 665, 678 (Bankr. N.D. Ind. 1987). While all courts that have addressed this matter have agreed that each factor must be satisfied, it remains apparent that there still exists some "uncertainty as to the exact standards that must be satisfied to successfully invoke the exception." Mark E. MacDonald, et al., *Confirmation by Cramdown Through the New Value Exception in Single Asset Cases*, 1 AM. BANKR. INST. L. REV. 65, 73 (1993).

[56] *In re Bonner Mall Partnership*, 2 F.3d at 908-09. One commentator sharply criticized the *In re Bonner Mall Partnership* decision for "preserving exclusivity." Strub, *supra* note 45, at 233. The debtor's proposal did, in fact, provide for a retention of half of the stock in the reorganized entity by only a certain group of old equity holders in exchange for cash contributions. *In re Bonner Mall Partnership*, 2 F.3d at 905. Although the Ninth Circuit did not grant confirmation, the court essentially instructed the bankruptcy judge to do so should the judge determine the plan to be feasible. *Id.* at 917-18. Presumably, had the Ninth Circuit's decision chronologically followed *203 North LaSalle Street Partnership* the court would have reached a different conclusion as to the plan's confirmability. For a practical application of *203 North LaSalle Street Partnership*'s teachings, see *infra* notes 145-79 and accompanying text.

[57] *In re* 203 N. LaSalle St. Partnership, 126 F.3d 955, 966-67 (7th Cir. 1997). While the United States Supreme Court ultimately reversed the Seventh Circuit's affirmance of the district court's confirmation of the "new value" plan in question, the Court did not specifically reverse the Seventh Circuit's finding as to the "new value" exception's continued vitality. Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1417 (1999). Rather, the Court merely disagreed with the Seventh Circuit's conclusion that the plan in the case satis-

liberal reading of the Code phrase "on account of" that would allow such an exception to remain viable.[58] Finding no clear

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fied the five requirements of the exception. *In re 203 N. LaSalle St. Partnership*, 119 S. Ct. at 1417. Specifically, the Court held that the plan failed to meet the requirements of the "new value" exception because it afforded only the old equity owners the right to bid for the equity of the reorganized entity and because it gave only the old equity holders the right to propose a plan of reorganization. *Id.* at 1422. While the Court did not elaborate on each flaw of the proposed plan, it held that the plan's two previously mentioned faults were sufficient to warrant denial of confirmation. *Id.*

[58] *In re 203 N. LaSalle St. Partnership*, 126 F.3d at 965. The court declared:

> We think that it is more reasonable to believe that Congress legislated on the understanding that, in new value transactions, old equity owners receive stock in exchange for the additional capital they invest. This interpretation is far more reasonable in terms of the practical realities of bankruptcy administration than the highly conceptualistic suggestion that the opportunity to participate in the reorganization is itself property retained on account of an old equity holder's prior ownership interest. As a practical matter, the opportunity to participate in a reorganization plan, even an exclusive right, is not retained on account of an old equity holder's former ownership interest; the opportunity to give new value and to have the opportunity to receive a return on that capital infusion is given because such participation, even exclusive participation, may enhance the value of the business after reorganization. Indeed, exclusivity may be necessary simply because it may be easier to obtain additional funding from the old equity participants.

Id. at 965-66.

In a dissenting opinion, Circuit Judge Kanne argued that the absolute priority rule did not include the "new value" exception and that

> even if one strain[ed] and [found] ambiguity in the language of the statute, thus necessitating a look at pre-Code practice, . . . the shaky foundation of the pre-Code new value exception coupled with the massive changes in bankruptcy procedures brought on by the Bankruptcy Code demonstrate that Congress did not intend to insert a new value exception into § 1129(b)(2)(B)(ii).

Id. at 970 (Kanne, J., dissenting). Judge Kanne disagreed with the majority's interpretation of "on account of," stating that the debtor's partners clearly retained their ownership interests as a direct result of their status as old equity holders. *Id.* at 971 (Kanne, J., dissenting). The Fourth Circuit Court of Appeals stressed similar concerns. Travelers Ins. Co. v. Bryson Properties (*In re* Bryson Properties), 961 F.2d 496, 504 (4th Cir. 1992). However, Judge Kanne refused to hold that the Code barred old equity holders from ever participating in a reorganized entity, suggesting that, for example, old equity holders could participate by earning their shares in an open auction. *In re 203 N. LaSalle St. Partnership*, 126 F.3d at 972 (Kanne, J., dissenting).

error after reviewing the bankruptcy court proceedings, the Seventh Circuit affirmed the lower court's approval of the "new value" plan.[59]

C. *Conclusion as to Continued Viability of Exception*

Clearly, courts[60] and commentators[61] alike have reached contrasting conclusions as to the continued viability of the "new value" exception,[62] and the Supreme Court's recent ruling in

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[59] *Id.* at 967-68. The bankruptcy court specifically found that the proposed capital infusion satisfied the requirements of being new, substantial, money or money's worth, necessary for successful reorganization, and reasonably equivalent to the interest retained. *Id.* at 967. In denying the dissenting creditor's contention that the disputed plan failed the "substantial" component of the five-part test, the court held that the contribution was "real and necessary to the successful implementation of the plan." *Id.* As the Seventh Circuit previously declared, "Whether the infusion of new capital is 'substantial' is more of a common sense determination than a mathematical calculation." *In re* Woodbrook Assocs., 19 F.3d 312, 320 (7th Cir. 1994); *accord In re* Snyder, 967 F.2d 1126, 1131-32 (7th Cir. 1992) (indicating that "[t]here is no mathematical formula for resolving the substantiality issue, and it will depend on the circumstances of the individual case"). With those guidelines in mind, the court in the instant case did not consider the bankruptcy court's confirmation of the plan erroneous where the investors proposed to infuse $6.125 million, or approximately 10.7% of the unsecured debt, into the reorganized entity. *In re 203 N. LaSalle St. Partnership*, 126 F.3d at 967. One source praised the Seventh Circuit, declaring that "because it upholds what it concludes is a 10% contribution, *203 N. LaSalle* is the first appellate court decision to provide some real guidance on how much of a new value contribution is required." Randolph J. Haines, *Recent Developments in Chapter 11*, *in* ANNUAL SURVEY OF BANKRUPTCY LAW 449, 461 (William L. Norton, Jr. ed., 1998).

[60] *See supra* notes 46-59 and accompanying text. Clearly, the majority of courts addressing this issue have held in favor of the exception's continued viability. Some of the courts not mentioned elsewhere in this comment have so ruled. *See* Liberty Nat'l Enters. v. Ambac La Mesa Ltd. Partnership (*In re* Ambanc La Mesa Ltd. Partnership, 115 F.3d 650, 654 (9th Cir. 1997); Sun Valley Newspapers, Inc. v. Sun World Corp. (*In re* Sun Valley Newspapers, Inc.), 171 B.R. 71, 77 (B.A.P. 9th Cir. 1994); *In re* Crosscreek Apts., Ltd., 213 B.R. 521, 546 (Bankr. E.D. Tenn. 1997); *In re* Beauchesne, 209 B.R. 266, 270 (Bankr. D.N.H. 1997); *In re* Waterville Valley Town Square Assocs., 208 B.R. 90, 99 (Bankr. D.N.H. 1997); *In re* Economy Lodging Sys., Inc., 205 B.R. 862, 865-66 (Bankr. N.D. Ohio 1997); *In re* Grandfather Mtn. Ltd. Partnership, 207 B.R. 475, 492 (Bankr. M.D.N.C. 1996); Condor One, Inc. v. Moonraker Assocs., Ltd. (*In re* Moonraker Assocs., Ltd.), 200 B.R. 950, 952 (Bankr. N.D. Ga. 1996); *In re* Applied Safety, Inc., 200 B.R. 576, 590 (Bankr. E.D. Pa. 1996); *In re* Haskell Dawes, Inc., 199 B.R. 867, 872 n.13 (Bankr. E.D. Pa. 1996); *In re* Duval Manor Assocs., 191 B.R. 622, 635 (Bankr. E.D. Pa. 1996); State St. Bank & Trust Co. v. Elmwood, Inc. (*In re* Elmwood, Inc.), 182 B.R. 845, 852 (Bankr. D. Nev. 1995); State St. Bank & Trust Co. v. Elmwood, Inc. (*In re* Elmwood, Inc.), 183 B.R. 845, 852 (Bankr. D. Nev.

1995); *In re* Fur Creations by Varriale, Ltd., 188 B.R. 754, 762 (Bankr. S.D.N.Y. 1995); *In re* HRC Joint Venture, 187 B.R. 202, 210 (Bankr. S.D. Ohio 1995); *In re* Midway Investments, Ltd., 187 B.R. 382, 391 (Bankr. S.D. Fla. 1995); *In re* Eddington Thread Mfg. Co., Inc., 181 B.R. 826, 834-35 (Bankr. E.D. Pa. 1995); *In re* Trevarrow Lanes, Inc., 183 B.R. 475, 489 n.16 (Bankr. E.D. Mich. 1995); *In re* Baseline-Dobson Ctr. Real Estate Ltd. Partnership, 193 B.R. 284, 289 (Bankr. D. Ariz. 1994); *In re* Short, 173 B.R. 946, 949 (Bankr. E.D. Okla. 1994); LW-SP2, L.P. v. Krisch Realty Assocs. (*In re* Krisch Realty Assocs.), 174 B.R. 914, 922 (Bankr. W.D. Va. 1994); *In re* 8315 Fourth Ave. Corp., 172 B.R. 725, 737 (Bankr. E.D.N.Y. 1994); *In re* EBP, Inc., 172 B.R. 241, 247 (Bankr. N.D. Ohio 1994); Principal Mut. Life Ins. v. Baldwin Park Towne Ctr. (*In re* Baldwin Park Towne Ctr.), 171 B.R. 374, 378 (Bankr. C.D. Cal. 1994); *see also In re* Union Meeting Partners, 165 B.R. 553, 570 (Bankr. E.D. Pa. 1994), *aff'd,* 52 F.3d 317 (3d Cir. 1995); *In re* Albrechts Ohio Inns, Inc., 152 B.R. 496, 502 (Bankr. S.D. Ohio 1993); *In re* Ropt Ltd. Partnership, 152 B.R. 406, 412 (Bankr. D. Mass. 1993); *In re* Waldengreen Assocs., Ltd., 150 B.R. 468, 469 (Bankr. M.D. Fla. 1993); *In re* Eitemiller, 149 B.R. 626, 630 (Bankr. D. Idaho 1993); FGH Realty Credit Corp. v. Newark Airport/Hotel Ltd. Partnership, 155 B.R. 93, 101 n.8 (Bankr. D.N.J. 1993); *In re* F.A.B. Indus., 147 B.R. 763, 769 (C.D. Cal. 1992); *In re* Professional Dev. Corp., 133 B.R. 425, 428 (Bankr. W.D. Tenn. 1991); *In re* VIP Motor Lodge, Inc., 133 B.R. 41, 44 (Bankr. D. Del. 1991); *In re* C.P.M. Constr., 124 B.R. 335, 339 (Bankr. D.N.M. 1991); *In re* Ashton, 107 B.R. 670, 674 (Bankr. D.N.D. 1989). *But see supra* notes 39-45 and accompanying text. Only a limited number of courts have followed this approach, and they include: *In re* Ribs Auto Sales, Inc., 140 B.R. 390, 395 (Bankr. E.D. Va. 1992); *In re* Embassy Enters. of St. Cloud, 125 B.R. 552, 554 (Bankr. D. Minn. 1991).

[61] *See* Rusch, *supra* note 4, at 1336 (arguing exception must be kept alive to ensure successful reorganizations); Markell, *supra* note 13, at 96 (expressing support for continued application of exception and referring to "[c]onfusion over absolute priority rule" as "deplorable" given overwhelming necessity for exception in reorganizations); Cathy R. Iles, Note, Dewsnup v. Timms*: Reinforcement or Vitiation of the "New Exception" to Chapter 11's Absolute Priority Rule*, 35 ARIZ. L. REV. 489, 490 (1993) (suggesting that "the *Dewsnup* decision, the legislative history of the absolute priority rule, and practical considerations of Chapter 11 reorganizations mandates recognition of the new value exception to the absolute priority rule under the 1978 Code"). *But see* Sterbach, *supra* note 47, at 188 (arguing that lack of inclusion of exception in Code was deliberately designed to indicate exception was no longer viable); White, *supra* note 12, at 2 (comparing absolute priority rule to "wall" which debtors should not be permitted to "breach" with "new value" exception); Julie L. Friedberg, Comment, *Wanted Dead or Alive: The New Value Exception to the Absolute Priority Rule*, 66 TEMP. L. REV. 893, 912 (1993) (maintaining that "[b]y deliberately excluding the new value concept from the Code, Congress expressed its intention to prohibit the exception's application to future Chapter 11 bankruptcies").

[62] Much of the dispute centers on the proper interpretation of the phrase "on

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account of." *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1419-22. For a discussion of the interpretation the Supreme Court appeared to favor, see *infra* notes 134-35 and accompanying text.

Courts have correctly been given much guidance as to how to interpret statutory language, and, clearly, most courts would agree that the first step is to "examine the statutory language itself." O'Connor v. United States Dep't of Energy, 942 F.2d 771, 773 (10th Cir. 1991). *See also* United States v. Turkette, 452 U.S. 576, 580 (1981) (analyzing language of statute first to determine if such language were clear and unambiguous); Mabey v. Southwestern Elec. Power Co. (*In re* Cajun Elec. Power Coop., Inc.), 150 F.3d 503, 513 (5th Cir. 1998) (same); Wilson v. Stocker, 819 F.2d 943, 948 (10th Cir. 1987) (same). Only when the language becomes unclear and ambiguous will courts review the legislative history of a statute. *O'Connor*, 942 F.2d at 773. *See also* Burlington N. R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987) (stating that judicial analysis of statute is complete if statutory language is clear); Rubin v. United States, 449 U.S. 424, 430 (1981) (noting that courts rarely analyze legislative history when statutory language is unambiguous).

However, courts will not always literally apply the plain language of statutes when such an application would be in conflict with the intentions of the drafters. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 244 (1989). *See also* Chemical Bank v. First Trust of N.Y. (*In re* Southeast Banking Corp.), 156 F.3d 1114, 1120 (11th Cir. 1998) (indicating presumption of conclusiveness of unambiguous statute may be overcome by finding literal application may disturb intentions of statute's drafters); Varsity Carpet Servs., Inc. v. Richardson (*In re* Colortex Indus., Inc.), 19 F.3d 1371, 1375 (11th Cir. 1994) (noting that courts do not literally apply statutes when literal application would be in contravention of intent of drafters).

Another tenet of statutory construction repeatedly referred to by courts has been to assume that when Congress intends to amend a statute to differ from the prior judicial interpretation of the statute, Congress makes clear a specific intent to do so. Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986). *See also* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 813 (1989) (holding that Congress adopts, unless it expressly indicates otherwise, statutory interpretations of courts when it codifies "a judicially defined concept"); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) (finding "silence" of statute to be "most eloquent" and indicative of lack of intent to make "important and controversial change in existing law"). In the area of bankruptcy statutes, the courts have followed this principal. Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). In *Davenport*, the Court declared that it would "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear intention that Congress intended such a departure." *Davenport*, 495 U.S. at 563. Likewise, the Court has noted that "Congress . . . enacted the Code with a full understanding of [previous bankruptcy] practice[s]." Dewsnup v. Timm, 502 U.S. 410, 419 (1992). The *Dewsnup* Court also added that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" *Dewsnup*, 502 U.S. at 419.

Unfortunately, various courts applying these same mandates have arrived at

203 North LaSalle Street Partnership, rather than settling the dispute, added fuel to the debate.[63] Those finding the exception still exists have argued that the Code does not expressly abolish the exception,[64] that opponents pointed to no intent by Congress to eliminate the exception,[65] and that the exception's application promotes the policies of Chapter 11.[66] On the other hand, those who contend the Code precluded the continued application of the exception have concentrated on Congress' failure to include the exception in the Code.[67]

Ultimately, the final impression one derives from analyzing these views is that the Code and the legislative history remain unhelpful to those attempting to decide this issue.[68] Yet, one

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very different conclusions as to the meaning of statutes. *Compare* Coltex Loop Cent. Three Partners v. BT/SAP Pool C Assocs. (*In re* Coltex Loop Cent. Three Partners), 138 F.3d 39, 43 (2d Cir. 1998) (interpreting "on account of" to be straightforward and to exclude "new value" exception), *with In re 203 N. LaSalle St. Partnership*, 126 F.3d at 964-65 (finding "on account of" ambiguous and, therefore, looking beyond mere statutory language to legislative history for guidance in interpreting that phrase).

[63] *See supra* note 19 and accompanying text.

[64] *See supra* note 47 and accompanying text.

[65] *See supra* note 48 and accompanying text.

[66] *See supra* note 49 and accompanying text.

[67] *See supra* notes 18, 41-44, and accompanying text.

[68] The responsibility for the current debate over the exception's existence rests with the silence of the drafters of the Code. Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1418 (1999). Congress had knowledge of the exception at the time it enacted the Code but chose not to address the exception's viability therein. Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (*In re* Bonner Mall Partnership), 2 F.3d 899, 912 (9th Cir. 1993). In fact, the drafters even considered proposals by the Bankruptcy Commission that included the exception. *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1418. After heated debates and extensive studies, however, the Code emerged without even mentioning the exception. *Id.* The Supreme Court itself found a rational conclusion as to the significance of Congress' failure to codify the "new value" exception unreachable. *Id.* Likewise, Professor Basil has so astutely pointed out that

> [w]hile arguments founded on theories of statutory construction have been forwarded by both proponents and opponents of the new value exception, these arguments are unpersuasive. Despite established principles of statutory construction, in enacting the Bankruptcy Code, the intent of Congress with regard to the new value exception cannot be readily ascertained. . . . Arguments premised on Congressional intent and statutory construction are conjectural and conclusory. More impor-

point does seem obvious: The Code does not absolutely preclude the possibility that the "new value" exception still exists.[69] Thus, rather than focusing on whether the exception survived the enactment of the Code, the question should become whether there ought to be such an exception.[70] After examining that question, one can only conclude that the debate as to whether the exception remained viable after the Code's enactment has entirely overlooked the simple, and very real, fact that there is a genuine need for this exception.[71]

II. THE NEED FOR THE "NEW VALUE" EXCEPTION

No resolution to the issue of whether the "new value" exception still exists can be satisfactorily reached by simply examining the Code and its legislative history.[72] In addition, the United States Supreme Court has repeatedly avoided, even as recently as May 1999, issuing a direct answer on the matter.[73] Yet, even more significant than the question of whether the exception remains alive is the question of whether courts

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> tantly, such arguments are of little value in providing a theoretical justification for or against continued application of the new value exception.

Basil, *supra* note 13, at 299-300.

[69] Even the United States Supreme Court conceded this point, commenting that neither the Code nor its legislative history clearly deleted the exception. *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1419. *See also In re Bonner Mall Partnership*, 2 F.3d at 910 n.25 (referring to exception as "an extra-statutory doctrine" not prohibited by Code); *In re* One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 707 (Bankr. S.D.N.Y. 1993) (noting Code "does not completely forbid old equity from retaining property"). Commentators have also indicated as much. Markell, *supra* note 13, at 102. Professor Markell noted that the controversy over the exception could be ended had the Code completely done away with it, but "Congress neither intended nor made such a statutory statement." *Id. See also* Nimmer, *supra* note 4, at 1051 (stating that exception remains alive even after Code's enactment).

[70] At least one commentator has agreed with that contention. *See* Klee, *supra* note 17, at 243. *See also* Kenneth N. Klee, *Valuation and Cram Down*, SB37 ALI-ABA 455, 471 (1997) (suggesting shift in focus to question of whether exception should continue to be applied).

[71] *See infra* notes 90-112 and accompanying text.

[72] *See supra* notes 18, 61, 68, and accompanying text.

[73] *See supra* note 19 and accompanying text. *See also infra* notes 127-36 and accompanying text.

should confirm such "new value" plans.

A. Arguments Against the Exception's Application

A plethora of reasons have been offered by opponents of the "new value" exception as to why the exception should not be applied. One of the most frequently stated contentions has been that, while one of bankruptcy's underlying policies is to promote successful reorganization and rehabilitation of debtors,[74] such an objective "must not be achieved by ignoring contractual obligations freely entered into between parties of equal bargaining power."[75] Commentators have repeatedly criticized the exception for its failure to ensure that these bargained for positions are maintained during the reorganization process.[76] A second concern raised by opponents of the exception has been that "it ignores the explicit language of section 1129(b)" by providing the debtor the "exclusive right" to submit a plan for confirmation.[77] According to those opposed to the exception, such an exclusive right constitutes "property," which the Code expressly prohibits an old equity holder from retaining.[78] Third, several commentators and most creditors maintain that the creditors themselves "are in the best position to know what is in their own best interests; if they are unwilling to accept a debtor's plan, courts should not force it on them."[79] Those

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[74] *See supra* note 4 and accompanying text.

[75] Basil, *supra* note 13, at 302. Professors Baird and Jackson concurred that those who contribute capital to existing businesses know, and even expect, at the time they make such contributions that there will possibly come a "day of reckoning" at which point the business must be dissolved or reorganized and its assets divided among those contributors. Baird & Jackson, *supra* note 23, at 740. *See also* LoPucki & Whitford, *supra* note 19, at 179 (stating that many believe "the goal of bankruptcy policy should be to achieve results that creditors had reason to expect, and hence implicitly bargained for, when they originally extended credit").

[76] Basil, *supra* note 13, at 302. Legal scholars have continually observed that shareholders have the status of residual claimants and, as such, should not receive any compensation until all other claimants receive payment in full. CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 150 (1992). Others have expressed general criticism of Chapter 11 bankruptcy, suggesting that it, like the "new value" exception, "forces the creditors to finance the reorganization venture and to bear the risks of losses from it. It might be said that the debtor is gambling with the creditors' money in trying to reorganize." SCARBERRY, *supra* note 3, at 19.

[77] Edward S. Adams, *Toward a New Conceptualization of the Absolute Priority Rule and Its New Value Exception*, 1993 DET. C.L. REV. 1445, 1480. *See also* Salvatore G. Gangemi & Stephen Bordanaro, Note, *The New Value Exception: Square Peg in a Round Hole*, 1 AM. BANKR. INST. L. REV. 173, 185 (1993) (arguing that Code precludes application of exception through its silence). The Second Circuit Court of Appeals in *In re Coltex Loop Cent. Three Partners*, like a small number of other courts, took this approach, noting that, on its face, the codified

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absolute priority rule would seem to eliminate the "new value" exception. Coltex Loop Cent. Three Partners v. BT/SAP Pool C Assocs. (*In re* Coltex Loop Cent. Three Partners), 138 F.3d 39, 46 (2d Cir. 1998).

[78] Adams, *supra* note 77, at 1480-81. Other bankruptcy scholars have held similar views, noting that

> [b]y giving the equityholder an exclusive right to receive equity in the reorganized company in return for a contribution, the contribution rule violates this standard. The right to make a contribution is itself a value, and thus arguably property, irrespective of the conditions under which the contribution is made. Because the contribution rule awards this privilege only to former equityholders, . . . the rule arguably cannot be reconciled with absolute priority.

Skeel, *supra* note 6, at 223.

Professor Adams noted that one could rephrase this argument to suggest that the problem with the exception is that it "arguably deprives creditors of that interest (property) to which they are entitled to under section 1129(b): The going concern value of the firm." Adams, *supra* note 77, at 1481. One of the most significant problems, Professor Adams pointed out, will be the difficulty courts will have in accurately assessing the firm's going-concern value, which will, thereby, permit debtors to "continue to avail themselves of their new value rights so long as the judicial valuation assigned to the entity fails to precisely assess its true value." *Id.* at 1482-83.

[79] Ronald J. Trost et al., *Survey of the New Value Exception to the Absolute Priority Rule and the Preliminary Problem of Classification*, SD24 ALI-ABA 401, 438 (1998). A number of courts have recognized this argument and have discussed it in connection with the "new value" exception. *See* Travelers Ins. Co. v. Bryson Properties (*In re* Bryson Properties), 961 F.2d 496, 504 (4th Cir. 1992) (suggesting that reasonable creditors will not reject plans that allow old equity holders to retain equity interests when such plans offer potentially higher future recoveries and, therefore, decision between acceptance and rejection should be left to creditors). *See also* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1360 (7th Cir. 1990) (stating that creditors "own" bankrupt firms and should be given authority to accept or reject "new value" plan based on their own views of such plan). Those asserting this contention have added that application of any supposed "new value" exception is highly fact-intensive, thereby allowing, and even forcing to some degree, the courts to "exercise their discretion without meaningful appellate review (as the 'abuse of discretion' standard governs the review of findings of fact)." Trost, *supra*, at 438. Professor Miller also argued that the limited review by appellate courts of the bankruptcy courts' findings warrant-

pressing this argument criticize the exception for allowing the courts to determine the value of the assets of the entity, which, according to this view, stands in direct conflict with the underlying goals of the "fair and equitable" doctrine.[80]

Additionally, those disfavoring application of the exception have complained that the exception permits, and even encourages, debtors to refuse to make pre-bankruptcy infusions of capital, and "perhaps even to draw money out of a struggling business, in anticipation of making a 'new value' contribution under chapter 11."[81] Thus, the argument implies that allowing

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ed elimination of the exception. Miller, *supra* note 14, at 1019.

[80] White, *supra* note 12, at 12. Professor White, in fact, wrote that the principal reason for the development of the "fair and equitable" doctrine was to ensure that courts did not place "unfairly low valuations," whether intentionally or unintentionally, upon the debtor's assets and, thereby, alter the rights of the creditors. *Id.* Other experts have concurred, noting the difficulty involved in determining the value of retained equity interests. Miller, *supra* note 14, at 1018-19. Professor Miller asserted that

> [n]ot only is the value of a newly organized corporation entirely speculative, but biased, interested parties with their legions of financial experts present the valuation data to the judge. The judge can no longer depend on the SEC for expert advice, or on the independent trustee for an independent, objective valuation. Congress cannot be said to have placed such a heavy burden on judges and creditors without any reference to the issue of new value.

Id. at 1019. The task imposed upon the courts often multiplies in difficulty when, as is often the case, the experts on both sides take extreme positions. Harry J. Haynsworth, IV, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 486 (1982). The *In re U.S. Truck* case clearly indicates the difficulty courts face in making valuation determinations. Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re* U.S. Truck Co.), 800 F.2d 581, 588 (6th Cir. 1986). There, the court, reviewing testimony that indicated the debtor planned to contribute $100,000 in return for the retention of certain equity interests in a company whose monthly profits were reportedly $100,000, could not find the district court's confirmation clearly erroneous. *In re U.S. Truck Co.*, 800 F.2d at 588. Although the plan, on its face, seemed to provide a clearly insufficient cash contribution, the court noted other testimony suggested that the industry and labor stability were both very risky and unstable and ruled that it was unwilling to reverse the lower court's decision. *Id.*

[81] Trost, *supra* note 79, at 438. *See also* Miller, *supra* note 14, at 1019 (recognizing this potential problem). This type of situation will most likely occur in close corporations. Ralph A. Peeples, *Staying In: Chapter 11, Close Corporations, and the Absolute Priority Rule*, 63 AM. BANKR. L.J. 65, 79-80 (1989). Professor Peeples contended that in close corporations, there exist few barriers to prevent

debtors to utilize the exception is counterproductive in that it affords those debtors the opportunity "to withhold capital from ailing companies and starve them into bankruptcy."[82] A fifth reason often given by those against the exception has been that it

> wrongly allows every debtor that otherwise satisfies the requirements of the Code to retain property of the estate for the benefit of existing equityholders without regard to whether the ownership's participation provides any special skills or knowledge that would add to the going concern value, or whether the debtor's reorganization is necessary to prevent the loss of jobs or the shrinkage of economic activity.[83]

A number of scholars have suggested that this argument really rings true in single-asset real estate reorganizations.[84] Next, opponents of the exception contend that its existence "unfairly strengthens every debtor's hand in negotiations by allowing it to use the threat of a new value plan to exact concessions from

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shareholders from withdrawing assets of the business when they foresee bankruptcy on the horizon. *Id.* at 79. The "withdrawal" can be made in any number of ways including salary raises or repayment of pre-existing loans from shareholders. *Id.*

[82] Trost, *supra* note 79, at 439.

[83] *Id.* Many fault management in situations in which businesses fail or need to reorganize in order to remain afloat and, therefore, suggest that, because of that, the exception should not be permitted. Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?* (pt. 2), 57 AM. BANKR. L.J. 247, 263 (1983). As one source noted:

> [C]orporations do not ordinarily fail because of lack of current capital; rather the appearance of a lack of current capital is an outward sign of more fundamental difficulties. As in the case of railroad failures the real cause of industrial failure is not likely to be a difficulty in securing credit due to sudden tightening in the money market . . . . The real reason . . . is not the obstinacy of the banks but the inherent and continued lack of capacity of the corporation itself. Behind this is the failure of management.

2 ARTHUR S. DEWING, FINANCIAL POLICY OF CORPORATIONS 1418-19 (5th ed. 1953).

[84] Gangemi & Bordanaro, *supra* note 77, at 192-94. According to these scholars, the exception arose in the context of multi-asset corporations whose failures led to widespread loss of "going-concern" values. *Id.* Yet, when applied in the single-asset context, the exception, they claim, makes little sense as there is no such value to lose. *Id.* at 192.

its creditors or to complicate and prolong plan negotiations."[85] Those against the exception's application note that, when combined with the exclusivity period for plan proposals, the exception enables debtors to force the dissenting creditors to accept almost any plan put forth by the debtors.[86] Finally, at least one commentator has urged courts to reject the exception on the ground that it no longer remains necessary.[87] Arguing that the exception arose at a time in which the nation desperately needed it to help revive failing railroads and businesses,[88] Professor Miller indicated that, now, with a strong economy, coupled with the lack of importance of railroads to the economic welfare of the country, "[n]either American industry nor the American economy requires reorganization, revitalization, and resuscitation of every failing business."[89]

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[85] Trost, *supra* note 79, at 439. According to one source that conducted interviews with approximately 80 bankruptcy lawyers, in a large percentage of Chapter 11 cases, old equity holders had been allowed to share in the distribution under the reorganization plan, thus leading to the conclusion that the mere threat of a "new value" plan actually allowed old equity holders "to obstruct the plan process" and gain an undeserved piece of the reorganized entity. Lynn M. LoPucki & William C. Whitford, *Preemptive Cram Down*, 65 AM. BANKR. L.J. 625, 627 (1991). Professor Nimmer has also considered this argument and accordingly wrote that

> [t]he new value concept is a loss allocation rule. Permitting a new capital contribution as a way to continue ownership not only permits the new investment, but also gives the owners an additional tool with which to negotiate a plan. The owners' increased influence is based on their willingness and ability to increase their risk. By giving the former owners more influence, however, there is a commensurate reduction in control for the other parties.

Nimmer, *supra* note 4, at 1052.

[86] Trost, *supra* note 79, at 439-40. *See also In re* A.V.B.I., Inc., 143 B.R. 738, 747 (Bankr. C.D. Cal. 1992) (claiming that "[t]he practical effect of the 'new value' exception would be to permit insiders to acquire the 'going concern' value of the debtor in a private sale at which no other bidders are allowed and in which the [creditors do] not like the proposed purchase terms").

[87] Miller, *supra* note 14, at 1017.

[88] *Id.* Professor Miller pointed out first that the exception was born at a time when railroads "played a vital role in the industrial development and commercialization of the United States." *Id.* Given their necessity Professor Miller noted that it was urgent that the railroads be saved even though that had to be accomplished through the "new value" exception. *Id.* Additionally, Professor Miller stated that, at the time the courts first established the exception, America was in the midst of the Great Depression, leaving courts with the responsibility to attempt to salvage what businesses they could in order to alleviate some of the economy's woes. *Id.* at 1017-18.

B. A Response to Those Criticisms

Despite the numerous reasons given for the elimination of the "new value" exception those favoring the exception's continued application have provided insightful, well reasoned responses to those criticisms. First, while one must admit the apparent veracity of the argument that the exception ignores contractual duties freely entered into by consenting parties, one cannot so easily agree with the logic underlying that argument.[90] Indeed, the contention implies that creditors always bargain for, and expect to maintain, a certain position should there come a so-called "day of reckoning," yet, as one source declared:

> Real creditors live, lend, and strike their bargains in a world where they have every reason to believe that defaulting debtors will file bankruptcy petitions, and that in those bankruptcies, the absolute priority rule will not be strictly enforced. Creditors set their terms of credit, including interest rates, accordingly. To begin enforcing the absolute priority rule in the guise of "prebankruptcy entitlement" would, in the short term at least, give creditors a windfall.[91]

Thus, as Professors LoPucki and Whitford indicated, creditors realize the "new value" exception retains vitality—more so in some circuits than others—and, therefore, alter the terms of credit to account for the possibility that the exception will be utilized by the debtor.[92] Second, while a straightforward reading of the Code may lead to the impression that the exception violates Congress' intentions, the majority of courts that have addressed the matter have adopted, or at least indicated, approval of a liberal reading of § 1129(b).[93] Additionally, a number of bankruptcy scholars have been quick to point out that the Code, while remaining silent on the matter, does not prohibit application of the exception.[94] Clearly, "new value" is a judicially created exception whose existence the Code does nothing to disparage.[95] As for the third argument presented by the exception's opponents, a number of legal scholars have found that the exception allows confirmation of plans worthy of accepting but which obstinate creditors refuse to approve due to perceived unfairness.[96] These commentators have urged that old equity holders, rather than creditors, have the best insight into the failing company and should be given some leeway to circumvent the seeming blindness of unwilling creditors.[97] Additionally, those who feel discriminated against under the debtor's proposal can, and should be allowed to, put forth their own competing plan.[98]

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[89] *Id.* at 1018. Professor Miller argued that a debtor who cannot obtain a loan or otherwise compete in the financial market to obtain capital necessary for reorganization will not likely be able to reorganize successfully anyway. *Id.*

[90] LoPucki & Whitford, *supra* note 19, at 180.

[91] *Id.* Professors LoPucki and Whitford speculated that strict application of the absolute priority rule could be more efficient than a system in which the "new value" exception existed, noting that "a system of absolute priority may seem more efficient because substituting a 'sum certain' for the uncertain amounts distributable under other systems reduces the strategic costs of competing for the debtors' assets and reduces variance in recoveries. . . ." *Id.* at 182. However, the article concluded, and rightfully so, that there remains no way to "establish factually what the most efficient rule governing distributions in bankruptcy would be." *Id.* at 182-83.

To counter the fourth argument against the exception supporters have noted that preference and fraudulent conveyance laws deter such "withdrawals" from the business in anticipation of the filing of a Chapter 11 petition.[99] These laws work not only to deter debtors from affording certain creditors a favored position with pre-bankruptcy transfers but also to prevent the debtor's equity holders from placing themselves in similar positions before the filing of a bankruptcy petition. Further, while some have contended that the exception encourages the shareholders to "starve" the business into bankruptcy, no scholar has provided statistical data to support this claim, leaving one skeptical as to the seriousness of this alleged problem.[100] When presented with the fifth argument against the exception, scholars have simply suggested that it lacks merit.[101] Reviewing the existing case law, one can see that those

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[92] *Id.* at 180.

[93] Bonner Mall Partnership v. U.S. Bancorp Mortgage Co. (*In re* Bonner Mall Partnership), 2 F.3d 899, 909 (9th Cir. 1993). The Supreme Court seemed to agree that the phrase "on account of" should be liberally construed so as to permit the "new value" exception to exist. *See infra* notes 134-35 and accompanying text.

[94] Coulson, *supra* note 39, at 224. *See supra* note 69 and accompanying text.

[95] *See supra* note 69 and accompanying text.

[96] Adams, *supra* note 77, at 1484. As Professor Adams noted, the exception serves as a vehicle by which debtors can avoid the stubbornness of certain dissenting creditors. *Id.*

[97] *Id.* at 1484-85. Professor Adams correctly asserted that old equity holders often have superior knowledge as to the likelihood of successful reorganization and should have the opportunity to pursue such a plan of action without interference from a class of uncooperative creditors. *Id.*

[98] *See infra* notes 176-79 and accompanying text.

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[99] Peeples, *supra* note 81, at 79. A Chapter 11 trustee, or any of the debtor's creditors, can set aside conveyances that "prefer a particular creditor" or which otherwise "deplete assets of the business without reasonable compensation." WARREN & WESTBROOK, *supra* note 8, at 631-32.

Professor Peeples attempted to downplay the significant role these two areas of bankruptcy law play. Peeples, *supra* note 81, at 79. Peeples suggested that the sole penalty for accepting a preference or fraudulent conveyance is that the recipient must return the transfer. *Id.* Additionally, Peeples seemed skeptical about the effectiveness of these two principles because, under them, the burden falls upon the unsecured creditors to search for and question any such transfers. *Id.*

[100] Indeed, one cannot simply reject this argument outright, but one can only wonder whether this type of shareholder behavior occurs in more than a small percentage of Chapter 11 cases.

[101] Adams, *supra* note 77, at 1484. Professor Adams so astutely observed that "the new value rule also assures that those who devote their personal resources . . . to a successful reorganization, have an opportunity to be rewarded for their services, thereby encouraging debtors to work to rehabilitate an entity that might otherwise be lost." *Id.* Thus, one must realize there is a necessary trade-off, and it is this trade-off that leads debtors to utilize their financial and entrepreneurial abilities for the benefit of the business and, in turn, the creditors.

As for the contention that the fault of the collapse of the business lies with the old management, those who have studied this issue have reached different conclusions. Harvey Miller, *Commentary on Absolute Priority*, 1991 ANN. SURV. AM. L. 49, 50. At least one researcher has found that studies demonstrate reorganizations in which former management remained in control often realize more success than those in which new managers were inserted. *Id.* The primary reason for the different results has been the expertise old management had in running the business. *Id.* *See also* Charles W. Adams, *New Capital for Bankruptcy Reorganizations: It's the Amount That Counts*, 89 NW. U. L. REV. 411, 419 (1995) (agree-courts that have confirmed "new value" plans have rigorously tested the plans to ensure that they satisfied the exception's five mandates.[102] Thus, it remains clear that this strict review essentially ensures that not just any old equity holder with some capital can easily gain approval of a "new value" plan.[103] Sixth, while the exception's existence may improve the bargaining power of debtors, the severance of exclusivity would neutralize that benefit and maintain the balance established in the Code.[104] Thus, by eliminating the powerful right of exclusivity, the debtor's leverage would be reduced so that the creditors could compete with the debtor for the equity interests in the reorganized entity. Finally, some claim the exception has lost its significance, yet the facts tend to suggest otherwise. Indeed,

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ing that elimination of existing shareholders, in many cases, negatively affects reorganized entity); Elizabeth Warren, *A Theory of Absolute Priority*, 1991 ANN. SURV. AM. L. 9, 19 (same). The Ninth Circuit agreed with this point, stating that "in many situations the new value exception allows control and management of the company to remain with the original owners, who arguably can best reestablish a profitable business. Old owners may have valuable expertise and experience that outside investors lack." Bonner Mall Partnership v. U.S. Bankcorp Mortgage Co. (*In re Bonner Mall Partnership*), 2 F.3d 899, 916 (9th Cir. 1993). The Seventh Circuit also accepted this line of reasoning. Snyder v. Farm Credit Bank of St. Louis, 967 F.2d at 1130.

[102] *See supra* notes 46-59 and accompanying text. An example of the strict application of these requirements can be seen in a recent California bankruptcy court decision. *In re* Dollar Assocs., 172 B.R. 945, 950 (Bankr. N.D. Cal. 1994). The court there even analyzed the plan to ensure that the plan furthered the "goals of preserving jobs and going concern value, and preventing the shrinkage of economic activity resulting from the liquidation of a going business." *In re Dollar Assocs.*, 172 B.R. at 950. Because the plan promoted none of these goals the court there denied confirmation. *Id.* at 953.

[103] *See supra* notes 46-59 and accompanying text.

[104] *See infra* notes 176-80 and accompanying text. Those supporting the exception's continued application also have responded that the exception "'levels the playing field' by giving equityholders the ability to propose plans in the face of creditor resistance." Trost, *supra* note 79, at 438. *See also* Richard L. Epling, *The New Value Exception: Is There a Practical, Workable Solution?*, 8 BANKR. DEV. J. 335, 339 (1991) (approving of "new value" exception despite benefits accruing to old equity holders). Epling further noted that "all of the proposals for pricing the new equity or opening up the plan process that follow will necessarily curtail the debtor's bargaining leverage to some degree. . . ." *Id.* This curtailing of leverage appropriately returns the relative bargaining power of each side to the level set forth in the Code. *Id.*

the infusion of capital by old equity holders, in a majority of Chapter 11 cases, remains a practical necessity if the reorganization is to be successful.[105] Without the assistance of old equity holders reorganization would undoubtedly be impossible in most instances.[106]

C. *Conclusion as to the Exception's Necessity*

As a host of commentators have indicated, the "new value" exception should be applied because it provides a "vital and natural source of new capital" for businesses attempting to reorganize.[107] Courts have also agreed, pointing out that, in most cases, these additional, and necessary, funds will not be added by outsiders.[108] By discriminating against old equity holders in refusing to permit them to participate in the new entity through capital contributions, those opposed to the exception push the struggling businesses to the brink of failure, which can, naturally, only lead to liquidation: a result neither side wants to see occur.[109] One bankruptcy scholar cleverly

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[105] As the First Circuit Court of Appeals stated:

> There would be little or no incentive for persons to come forward with long-chance commitments in aid of a corporate reorganization when the outlook is cloudy and uncertain, if the very success of the venture is taken as ground for denying its fruits to the one who is willing to make the speculation.

Horowitz v. Kaplan (*In re* Waltham Watch Co.), 193 F.2d 64, 73 (1st Cir. 1951). One should also keep in mind that these contributing old equity holders take risks in infusing this much-needed capital. Nimmer, *supra* note 4, at 1051-52. While some might suggest that the taking on of additional risk remains an insufficient reason to permit the old equity holders to retain equity interests, these contributions "are not equally available from [other sources]." *Id.* at 1052. Professor Nimmer concluded that "[a]s a matter of practice, an available investor is preferred to unknown, potential investors and this creates a tangible reason to permit such investments. . . ." *Id.*

[106] *Id.*

[107] Trost, *supra* note 79, at 436.

[108] *See supra* note 105 and accompanying text.

[109] Those involved with bankruptcy have readily acknowledged that

> [i]f the business is liquidated on the auction block, the assets and the work force will be dispersed; whatever value was created by bringing them together and forging them into a productive whole will be lost. The

summed up this argument, simply declaring that "[c]reditors should not care about the source of their creditor dividends."[110] Indeed, if the "new value" plan provided creditors with the best possible return, creditors seem to have no rational basis for rejecting the proposal simply because they have misconceptions that the old equity holders may have acted unfairly.[111] Indeed, "it seems foolish, even from the standpoint of creditors, to impose a total prohibition on purchases by those who in many cases will be the only potential purchasers."[112]

III. THE SUPREME COURT'S HOLDING IN *203 NORTH LASALLE STREET PARTNERSHIP*

Thus, it seems readily apparent that the "new value" exception should be permitted in Chapter 11 cases, and when the Supreme Court granted certiorari in the *203 North LaSalle*

> value of the relationships, goodwill, and name recognition will also be destroyed. The value of other intangible assets will be diminished . . . . The liquidation sale price of tangible assets is often very low compared to the value they would have as part of a productive whole.

SCARBERRY, *supra* note 3, at 3. Additionally, the reality for unsecured creditors is often that a liquidation results in a recovery of no money, thus leaving them with some apparent motivation to seek reorganization rather than liquidation. *Id.* at 12.

This approach of preventing only old equity holders from participating "suggests archaic notions of punishment for the sin of insolvency or a redemptive purge of old owners." Trost, *supra* note 79, at 437. *See also* Peeples, *supra* note 81, at 82 (arguing against "punishment function" as it fails to accomplish anything but decrease likelihood reorganization will succeed).

[110] Markell, *supra* note 13, at 106. Professor Markell noted that courts may confirm a plan that enables a third party to purchase the interests in the reorganized entity just as easily as a plan which allows the debtor to do so, making it nonsensical for a plan to be rejected simply because of the position held by the potential purchaser. *Id.*

[111] *Id.* Creditors have disagreed, though, and have contended that debtors have unfair advantages in bankruptcy. *Id.* Thus, creditors maintain that any plan presented by the debtor must naturally favor the debtor. *Id.* Yet, any perceived bias can be sufficiently remedied by allowing those dissenting creditors to propose competing plans. *See infra* notes 176-79 and accompanying text.

[112] HERBERT, *supra* note 44, at 347. *See also* Jeffery M. Sharp, *Bankruptcy Reorganizations, Section 1129, and the New Capital Quagmire: A Call for Congressional Response*, 28 AM. BUS. L.J. 525, 552 (1991) (questioning why creditors would object, and why creditors should be permitted to do so, to plans that increased assets of new entity).

Street Partnership case in 1999, many believed the Court would finally put to rest this debate over the existence and the merits, or lack thereof, of the "new value" exception. Yet, rather than settling the issue, the Court only added to the uncertainty surrounding the exception.

A. *Factual Background*

203 North LaSalle Street Partnership ("Debtor") borrowed approximately $93 million from petitioner, Bank of America National Trust and Savings Association ("Bank"), only to default in January 1995.[113] The loan had been secured by a nonrecourse first mortgage[114] on the Debtor's principal asset: fifteen floors of an office building in downtown Chicago.[115] After the Bank commenced foreclosure proceedings in Illinois state court, the Debtor filed a voluntary petition for relief under Chapter 11 of the Code.[116] One of the motivating factors that led to the filing of the petition was the Debtor's desire to retain title to the property in order to avoid $20 million in personal tax liabilities that would arise if foreclosure occurred.[117] The debt owed the Bank exceeded the value of the mortgaged property, leaving it with an unsecured deficiency of $38.5 million.[118] Under the debtor's proposed reorganization plan, that

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[113] Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1414 (1999).

[114] *Id.* n.3. Professor Scarberry defined a nonrecourse loan as one "secured by a lien encumbering property of the debtor which by terms of an agreement or applicable law entitles the creditor upon default to proceed only against the collateral." SCARBERRY, *supra* note 3, at 857-58 n.12.

[115] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1414.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 1415. The Bank initially separated its undersecured claim into a secured claim and an unsecured deficiency claim. *Id.* at 1414. The debtor also placed the Bank's larger undersecured claim into two distinct categories as required in the Seventh Circuit. *Id.* at 1415 n.7.

When secured creditors find themselves undersecured ("i.e., the collateral is worth less than the total debt owed to that creditor"), those creditors essentially possess two separate claims against the debtor: an allowed secured claim and an allowed unsecured claim. WARREN & WESTBROOK, *supra* note 8, at 268. Accordingly, the "allowed secured claim" can be valued no greater than the value of the deficiency claim would be discharged for an estimated sixteen percent of its present value.[119] Further, the plan provided that several former partners of the Debtor would contribute $6.125 million in new capital over the next five years[120] in exchange for entire ownership of the reorganized company.[121] As the sole member of an impaired class of creditors, the Bank objected and blocked confirmation.[122] At that point, the Debtor opted to pursue confirmation through the "cramdown" process provided for in 11 U.S.C. §1129(b).[123]

After two revisions and modification by the bankruptcy court, the bankruptcy judge confirmed the Debtor's plan.[124] On appeal, the District Court for the Northern District of Illinois affirmed the bankruptcy court's decision, holding that the Code had not eliminated the "new value" exception and that the disputed plan met each of the exception's five traditional requirements.[125] Ultimately, the Seventh Circuit Court of Appeals affirmed the bankruptcy court's decision in its entirety at which point the Bank appealed to the United States Supreme Court.[126]

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collateral "with the remainder of the claim classified as an allowed unsecured claim." *Id.* Were a creditor oversecured the creditor's claim remains limited to the amount owed by the debtor. *Id.*

[119] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1415.

[120] *Id.* The Court estimated this amount to be worth approximately $4.1 million in present value. *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] 203 N. LaSalle St. Partnership v. Bank of Am. Ill. (*In re* N. LaSalle St. Partnership), 126 F.3d 955, 959 (7th Cir. 1997). The bankruptcy court, after rejecting the Debtor's initial plan as not feasible, ultimately approved a revised version after finding it met all the requirements under § 1129. *203 N. LaSalle St. Partnership*, 126 F.3d at 959.

[125] *Id.* at 959-60. The district court additionally rejected the Bank's contention that potential cash shortfalls in years seven and eight of the plan made the plan unfeasible. *Id.* at 960.

[126] *Id.* at 970. For an in-depth look at the Seventh Circuit's decision, see *supra* notes 57-59 and accompanying text.

B. The Court's Holding

Noticing an obvious split among the circuits, the United States Supreme Court granted certiorari to review the issue.[127] A majority of six Justices concluded that if the "new value" exception had survived the codification of the absolute priority rule, the debtor's equity holders could not, if a class of impaired creditors objected, contribute new capital and receive ownership interests in the reorganized business when those equity holders had the exclusive opportunity to obtain those interests or had the exclusive opportunity to propose a reorganization plan.[128] Specifically, the Court declared that "plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of §1129(b)(2)(B)(ii)."[129] The Court stressed that it "disfavor[ed] . . . decisions untested by competitive choice"[130] and refused to approve this plan because other interested parties lacked the ability to compete for the equity or to suggest a competing plan.[131]

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[127] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1416. Adding to the confusion surrounding this issue has been the reluctancy of a number of other circuits to answer the question. *See* Unruh v. Rushville State Bank of Rushville, Mo., 987 F.2d 1506, 1510 (10th Cir. 1993) (declining to reach ultimate issue as to whether "new value" exception continued to exist, simply holding instead that debtor offered no evidence reorganization plan met requirements of *Case* and, therefore, could not be confirmed). *See also In re* Wabash Valley Power Ass'n, 72 F.3d 1305, 1314-15 (7th Cir. 1996) (discussing but not deciding whether exception still exists); John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs., 987 F.2d 154, 162 n.12 (3d Cir. 1993) (failing to reach issue of viability of exception as debtor's plan was not reasonably certain to succeed); Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1284 (5th Cir. 1991) (withdrawing its earlier determination that "new value" exception did not survive codification of absolute priority rule and refusing to comment further on issue).

Similarly, the Seventh Circuit Court of Appeals, prior to its decision in *In re 203 North LaSalle Street Partnership*, repeatedly refused to determine whether the "new value" exception remained viable. *In re* Snyder, 967 F.2d 1126, 1131 (7th Cir. 1992). *See also* Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1362 (7th Cir. 1990) (rejecting proposed "new value" plan for lack of sufficiency of infused capital but "stopping short of the precipice" of holding "new value" exception no longer existed); Stegall v. Federal Land Bank of St. Louis (*In re* Stegall), 865 F.2d 140, 142-44 (7th Cir. 1989) (same). Yet, while avoiding the issue, the Seventh Circuit stressed the wisdom of applying the concept. *In re Snyder*, 967 F.2d at 1130. In *In re Snyder*, the court explained that

> [o]wners often have valuable information about the enterprise that outsiders lack, and owner participation allows this information to be put to use. In addition, owners may have incentives, including noneconomic incentives, to provide necessary new value that cannot be obtained elsewhere . . . . [I]t is not clear why prior owners should be excluded from participation based on a new contribution when a third party could buy ownership of the enterprise under a crammed-down plan.

Id.

The Court, however, made no decision as to whether the Code provided for or permitted a "new value" exception.[132] Although the Court made intimations suggesting the "new value" exception remained viable, stating that the Code's legislative history "[did] nothing to disparage the possibility apparent in the statutory text, that the absolute priority rule now on the books . . . may carry a new value corollary," the Court declined to provide a definitive statement on the issue.[133] The Court did seem to favor a somewhat liberal reading of the Code's phrase "on account of" that would be broad enough to encompass a "new value" exception.[134] Under this preferred reading,

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[128] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1424.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 1422. In his dissent, Justice Stevens suggested that the Debtor had no "vested right" to purchase the equity interests until confirmation of the plan by the bankruptcy court. *Id.* at 1429 (Stevens, J., dissenting). As Justice Stevens pointed out, the bankruptcy court chose to confirm the proposal rather than to terminate the exclusivity period and permit creditors to offer competing plans, knowing full well that the Code would, at that moment, demand immediate implementation by the Debtor. *Id.* at 1429-30 (Stevens, J., dissenting). Thus, Justice Stevens found it difficult to fault the Debtor and to characterize the Debtor's right to purchase the equity interests as "exclusive." *Id.* at 1430 (Stevens, J., dissenting).

[132] *Id.* at 1417.

[133] *Id.* at 1419.

[134] *Id.* at 1421-22. One commentator recently suggested:

> Which of the three interpretations of "on account of" a majority of the Court might adopt would appear to be a moot question in light of the holding that confirmation procedures for new value plans must include competing plans or competitive bidding on the new equity. If creditors are given the opportunity to pursue their own plans and/or bid on the new equity, it would appear that the high Court is not likely to be pre-

the Court declared that

> [c]ausation between the old equity's holdings and subsequent property substantial enough to disqualify a plan would presumably occur on this view of things whenever old equity's later property would come at a price [too low] . . . when the equity holders obtained or preserved an ownership interest for less than someone else would have paid. A truly full value transaction, on the other hand, would pose no threat to the bankruptcy estate not posed by any reorganization, provided of course that the contribution be in cash or be realizable money's worth.[135]

Unfortunately, the Court retreated and failed to settle the matter.[136]

C. *Concurring and Dissenting Views*

Justice Thomas, joined by Justice Scalia, concurred with the majority's conclusion but found the Court's commentary on the existence, or lack thereof, of the "new value" exception unnecessary and unwarranted.[137] Rather, Justice Thomas argued that the Court needed not even reach that issue to decide the case because the reorganization plan failed the Code's first requirement of being "fair and equitable."[138] Justice Thomas found the equity holders "undoubtedly received at least one form of property—the exclusive opportunity—'on account of'

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sented with a case where it would have to adopt one interpretation over the others.

Clark B. Callaghan & Russell H. Hippe, Jr., LaSalle*: Does the Code Dispense with the New Value?*, NORTON BANKR. L. ADVISER, June 1999, at 6, 6.

[135] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1421-22.

[136] *Id.* at 1417.

[137] *Id.* at 1424 (Thomas, J., concurring).

[138] *Id.* (Thomas, J., concurring). The Code declares that, at a minimum, a plan can be considered fair and equitable only if it "provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim," or if "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. §§ 1129(b)(2)(B)(i)-(ii) (1994).

their prepetition equity interest."[139] Since 11 U.S.C. § 1129(b)(2)(B)(ii) bars a prepetition equity holder from retaining "any" property[140] Justice Thomas stated that the proposed plan here clearly violated the "fair and equitable" requirement.[141]

A dissenting Justice Stevens criticized the majority for evading the question of whether the "new value" exception remained viable.[142] Justice Stevens did, however, applaud the Court for "reject[ing] the Government's 'starchy' position that an old equity holder can never receive an interest in a reorganized venture as a result of a cramdown unless the creditors are first paid in full."[143] Yet, Justice Stevens wanted the Court to take the next step, arguing that when a junior claimant inserted capital that had "an equivalent or greater value" than that being retained, "it should be equally clear that [the junior claimant's] participation is based on the fair price being paid and that it is not 'on account of' [the claimant's] old claim or equity."[144]

IV. *203 NORTH LASALLE STREET PARTNERSHIP*'S IMPACT ON FUTURE CHAPTER 11 CASES

Despite the Supreme Court's retreat in *203 North LaSalle Street Partnership* the Court's decision in that case will, indeed, have a significant impact upon future "new value" proposals.[145] While many have openly criticized the Court's failure to settle the issue,[146] one cannot overlook the fact that the Court has provided bankruptcy practitioners, scholars, and courts alike with suggestions and hints as to how the "new value" exception should be applied in the future.

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[139] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1425 (Thomas, J., concurring).

[140] "Property" has been broadly interpreted under the Code. *See supra* note 11 and accompanying text. According to Justice Thomas, the "exclusive opportunity" to purchase these equity interests qualified as "property." *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1425 (Thomas, J., concurring).

[141] *Id.* at 1424 (Thomas, J., concurring).

[142] *Id.* at 1427 (Stevens, J., dissenting).

[143] *Id.* (Stevens, J., dissenting).

[144] *Id.* (Stevens, J., dissenting).

[145] Commentators expect many more years of litigation to result from the Court's failure to fully resolve this debate. *See* George H. Singer, *Supreme Court Clarifies "New Value Exception" to Absolute Priority Rule—Or Does It?*, 18 AM. BANKR. INST. J., July-Aug. 1999, at 1, 47; Jonathan Backman, *In* LaSalle*, the Supreme Court Does It Again—Nothing*, BANKR. STRATEGIST, June 1999, at 1, 1.

A. *What the Supreme Court Really Indicated*

Essentially, the Court in *203 North LaSalle Street Partnership* ruled that any plan not allowing outsiders to compete for the reorganized entity's equity or to propose a competing plan is, on its face, invalid under the Code.[147] In fact, the Court characterized those exclusive opportunities as "property," which the Code prohibits old equity holders from retaining.[148] To avoid such facial invalidity a "new value" plan, the Court maintained, must undergo "some form of market valuation," so that the adequacy of the proposed contribution of the old equity holders may be properly tested.[149] Unfortunately, the Court did not feel the need to address the issue of whether an appropriate market test definitely had to afford others the chance to suggest competing plans or whether the "market test" component could be satisfied by merely permitting others to bid under the debtor's proposed plan.[150] Nor did the Court feel compelled to address each flaw it observed in the disputed "new value" plan.[151] Instead, the Court noted that those faults it had pointed out were so significant that it needed not delve any further into the case.[152] Thus, in *203 North LaSalle Street Partnership*, the Court, although it did not entirely settle the central issue, implied "new value" plans could be confirmed[153] and offered some vague guidelines for the future.

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[146] Mark A. McDermott, *Bankruptcy Reorganizations: Before and After the Supreme Court's Stillborn Decision in* 203 North LaSalle, 46 FED. LAW., Aug. 1999, at 22, 26-27.

[147] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1422. Analysts have interpreted the Court's recent ruling as such. *See Junior Creditors Cannot Invest in New Entity and Receive Interests over Senior Creditors*, 156 N.J. L.J. 500, 500 (May 10, 1999).

[148] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1422. The Court rejected the notion that these exclusive rights were not property simply because they lacked "market value," but instead were only significant to old equity holders in that these rights allowed them to avoid tax liabilities personal to them. *Id.* The Court stated that "the assumption that no one but the Debtor's partners [would] pay for such an opportunity would obviously support no inference that it is valueless, let alone that it should not be treated as property." *Id.*

After determining those rights to be property, the Court questioned why the old equity holders should be given the sole right to obtain them. *Id.* The lone answer the Court could find was that the old equity holders would, in return, "add the stated purchase price [of] the estate." *Id.* Yet, as the Court pointed out, that response fails to address why that right to contribute should be given exclusively to the old equity holders. *Id.* The Court explained that the exclusiveness could only be described as "a favor" for the old equity holders. *Id.* at 1423.

The Court further noted that there was favoritism despite the claim by the old equity holders that they were paying "top dollar." *Id.* The Court rejected that argument, stating that the old equity holders could not possibly prove they had paid top dollar given the lack of exposure to a market test or a competing plan. *Id.*

[149] *Id.* at 1423-24. Subsequent decisions have reflected this approach. *See In re*

B. "New Value" Plans After 203 North LaSalle Street Partnership

Even prior to the Supreme Court's ruling in *203 North LaSalle Street Partnership* bankruptcy scholars had pondered under what circumstances a "new value" plan should be permitted. Two answers repeatedly rose to the top of the list: (1) plans subject to an auction and (2) plans in which the exclusivity period had been terminated to allow others to propose competing plans. These two suggestions remain at the forefront of the debate over what type of plan could satisfy the vague requirements of *203 North LaSalle Street Partnership*.

C. Auction

One solution presented by commentators has been to conduct an auction of the debtor's proposed interests in the reorganized entity.[154] Accordingly, the court would essentially "sell"

Mama's Original Foods, Inc., 234 B.R. 500, 504 (Bankr. C.D. Cal. 1999) (noting that most accurate way to determine market value remains exposure to marketplace).

[150] *203 N. LaSalle St. Partnership*, 119 S. Ct. at 1424.

[151] *Id.* at 1422.

[152] *Id.*

[153] *Id.* at 1421-22. In noting its preference for a very broad reading of "on account of," the Court seemed to indicate that the "new value" exception remained very much alive. *See supra* notes 134-35 and accompanying text.

[154] Markell, *supra* note 13, at 117-24. Professor Tabb has written that the

the interests sought by the old equity holders to the highest bidder, whether that be the old equity holders, a creditor or group of creditors, or some other interested outsider.[155] Experts have suggested that, with auctions, valuation errors can be eliminated and higher prices for the reorganized entity can be realized.[156] In the end, proponents assert that auctions produce "better-capitalized firms and safer debts."[157]

a. *An Application of the Auction Process:* In re Bjolmes Realty Trust

At the center of *In re Bjolmes Realty Trust*[158] stood the dispute as to whether the debtor's principal shareholders could retain their equity interests in the reorganized entity by means of the "new value" exception.[159] The Federal Deposit Insurance Corporation ("FDIC") objected to the plan, arguing that the "new value" exception lacked vitality.[160] Although the

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auction process would serve as a useful tool in "test[ing] the validity of [the] assumption" that the necessary capital will not be available from someone other than the old equity holders. TABB, *supra* note 4, at 879. A number of legal scholars have also advocated the use of the auction process in this situation. *See* John T. Bailey, *The "New Value Exception" in Single-Asset Reorganizations: A Commentary on the* Bjolmes *Auction Procedure and Its Relationship to Chapter 11*, 98 COM. L.J. 50, 66-67 (1993); Miscioscia, *supra* note 7, at 951-52.

[155] John M. Czarnetzky, *Time, Uncertainty, and the Law of Corporate Reorganizations*, 67 FORDHAM L. REV. 2939, 2998-99 (1999). The auction process proceeds upon the assumption that the lack of outside bidders indicates that the new value being inserted accurately reflects the actual value of the interests being retained under the plan. *Id.* at 2999. *See also* Adams, *supra* note 77, at 1496 (claiming that absence of outside bids proves old equity holders' bid to be indicative of market value of equity interests).

[156] Nicholas L. Georgakopoulos, *New Value, Fresh Start*, 3 STAN. J.L. BUS. & FIN. 125, 147 (1997). Even critics of the auction realize the process can, if successful, be beneficial in allowing a quicker transfer of assets and resources to the "highest valuing user." David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 477.

[157] Georgakopoulos, *supra* note 156, at 147.

[158] *In re* Bojolmes Realty Trust, 134 B.R. 1000 (Bankr. D. Mass. 1991).

[159] *In re Bjolmes Realty Trust*, 134 B.R. at 1001. The debtor's primary asset consisted of a 15-unit apartment building in Spencer, Massachusetts. *Id.* The case arose due to the debtor's inability to make its loan payments on the building. *Id.*

[160] *Id.* The FDIC also contended, unsuccessfully, that the plan should fail because it improperly classified the claims of creditors in order to obtain approval

court expressed no hesitancy in declaring the "new value" exception viable,[161] the court did display a great deal of doubt as to its capacity to determine the value of the equity interests to be retained by these shareholders under the "new value" proposal.[162] The court, in fact, pointed to the flaws of other decisions in which courts had attempted to place valuations on such retained equity interests[163] and, vowing not to make similar mistakes, took a unique approach and ordered that an auction of the interests at stake be held among the debtor's shareholders and other interested creditors.[164] The court sug-

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by at least one impaired class of claims. *Id.*

[161] *Id.* at 1006. The court simply stated that the codified absolute priority rule "is perfectly consistent with the exception" because the retention of equity interests in exchange for new capital contributions cannot be truly characterized as being "on account of" a pre-existing position. *Id.* Rather, the court held that the basis for that retention of equity interests was the contribution itself. *Id.*

[162] *Id.* at 1008. The court raised a number of valid questions involving valuations of equity interests including

> [h]ow does one determine that it is necessary to seek capital only from stockholders without first exploring other sources, including creditors? Is the required equivalency between the contribution and the retained stock interest to be determined through a valuation by the court (presumably reflecting debt discharge) or through actual market forces? If through valuation by the court, under what standard of valuation? If through market forces, would not bidding be required, and, if so, should the bidding be open to third parties as well as creditors? If some form of bidding is permitted, should the court also value the stock as a check on the winning bid? What capital is essential to the success of the enterprise? Should there be a standard for determining a required minimum?

Id.

[163] *Id.* The court expressed concern over the fact that other courts had failed to recognize that the value of the retained stock could be "enhanced by the discharge of debt under the plan." *Id.* Connected to that shortcoming of other courts' attempts to determine equity values, the *In re Bjolmes Realty Trust* court suggested, was the fact that those courts would often forego meaningful valuation procedures and, instead, simply do a peripheral scan of the contribution to ensure its reasonable equivalence to the interests retained in order to promote reorganizations. *Id.*

[164] *Id.* at 1010. The high bidder would then be required to put into effect the debtor's proposal. *Id.* at 1011. Interestingly, the creditors could not "bid on credit, as they could do in a foreclosure of the actual building, because they would not be bidding for the building but for the equity of its owner." Georgakopoulos, *supra* note 156, at 151. The proceeds from the winning bid would go to the debtor's unsecured creditors "whose claims would be discharged, while the secured claim

gested that the auction process offered the only true means of accurately assessing these values and, accordingly, ruled that it would not confirm the plan until an actual auction had been held.[165]

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would survive according to the plan's terms." *Id.*

An auction, the court intimated, would alleviate the court's burden of deciphering these valuation issues. *In re Bjolmes Realty Trust*, 134 B.R. at 1011. Two years later the Massachusetts bankruptcy court followed *In re Bjolmes Realty Trust*'s approach, holding that it would not confirm a "new value" plan unless the debtor sent to all creditors a notice of sale of the equity interests in the new entity to the old equity holders. *In re* Ropt Ltd. Partnership, 152 B.R. 406, 412-13 (Bankr. D. Mass. 1993). The court in *In re Ropt* agreed with the reasoning of the *In re Bjolmes Realty Trust* decision and declared that the auction process remained the only accurate measure of these non-publicly traded equity interests. *Id.* at 412.

Other courts have, however, expressed reluctance to adhere to the auction requirement of *In re Bjolmes Realty Trust. In re* Economy Lodging Sys., Inc., 205 B.R. 862, 866 (Bankr. N.D. Ohio 1997). The court there observed that

> [a]lthough this procedure obviates concern that an owner may have obtained a continuing interest because of his leverage in the case and dramatizes the possibility of an owner acquiring an interest in the reorganized entity not attributable to his interest in the debtor, most courts have been content to look to the factors noted in *Case* to attempt to determine whether the owner's continued participation is consistent with creditors' absolute priority.

In re Economy Lodging, 205 B.R. at 866.

Notably missing from those the *In re Bjolmes Realty Trust* court required to be included in the auction process are other interested third parties. *In re Bjolmes Realty Trust*, 134 B.R. at 1010. The court, however, seemed to indicate that the creditors involved in this case had strong enough interests to motivate them to participate in the auction and had the financial wherewithal to do so. *Id.* Thus, the court apparently felt no need to include third parties. *Id.*

[165] *Id.* at 1010. A number of commentators have praised the court in *In re Bjolmes Realty Trust* for its decision. *See, e.g.,* John T. Bailey, *The "New Value Exception" in Single-Asset Reorganizations: A Commentary on the* Bjolmes *Auction Procedure and Its Relationship to Chapter 11*, 98 COM. L.J. 50, 67 (1993). *See also* Miscioscia, *supra* note 7, at 951-53 (claiming auction process to be best way to ensure adherence to absolute priority rule as it ensures offers by old equity holders are sufficient). Indeed, others have concurred, declaring that qualitative values can only be determined through a competitive process like an auction. LEWIS H. HANEY, VALUE AND DISTRIBUTION 136-37 (1948). Without competition there can be no way to "ensure that all value is transferred to creditors in a new value plan and that [the old equity holder] is not using the bankruptcy process to get a bargain." Strub, *supra* note 45, at 250. Bailey applauded the decision, writing that, first

b. Problems with Auctions

While the auction process would presumably survive scrutiny under *203 North LaSalle Street Partnership* as it leads to a "market test" of the equity interests at stake, several scholars have noted certain potential problems with auctions.[166] One of the major problems foreseen by the commentators has been that, due to the lack of information pertaining to the company available to outsiders, few creditors, if any, will bid on the equity interests at stake.[167] Not only does this disparity of

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> [t]his auction allows creditors an alternative and more powerful way to object to a plan that arrogates some of the value they believe is due them to old equity. Rather than relying on their ability to challenge a court's valuation of the debtor and the retained interests, creditors may make bids that reflect the implicit valuation that they attribute to the property.

Bailey, *supra* note 154, at 67. Secondly, Bailey claimed that the *In re Bjolmes Realty Trust* auction promoted efficiency by eliminating lengthy and costly valuation hearings. *Id.* Yet, even Bailey admitted the potential flaws of the auction. *Id.* at 76. Bailey noted that when one moved away from single-asset cases to situations in which managerial know-how has great importance, the auction process can seem less realistic but suggested that courts could alleviate this problem by requiring bidding creditors to prove their ability to implement the plan should they outbid the debtor. *Id.* Bailey further agreed that the auction seems unworkable with large corporate bankruptcies but avoided the issue by declaring that most of those bankruptcy cases involve parties who "are quite willing to arrive at consensual solutions." *Id.* At least one other source has acknowledged that auctions of large corporations will not likely be successful. William H. Kiekhofer, III & Kelley Drye, Bank of America Nat'l Trust and Savings Ass'n v. 203 North LaSalle Street Partnership*: The New Value Exception to the Absolute Priority Rule Is Alive, But Not Well*, 7 METRO. CORP. COUNSEL 6 (col. 1) (June 1999).

[166] Czarnetzky, *supra* note 155, at 2999. Professor Skeel simply declared that auctions "would not work as intended in the insolvency context." Skeel, *supra* note 156, at 477.

[167] Czarnetzky, *supra* note 155, at 2999. Professor Skeel concurred, noting the unlikelihood of a large influx of bidders. Skeel, *supra* note 156, at 477. In the words of one commentator, "[a] buyer at an acceptable price is not likely to appear" because of the scarcity of available information on the business. Peeples, *supra* note 81, at 106. Others have added:

> The problem with selling a firm's equity is that this equity is extraordinarily difficult to price. Valuation depends on estimates of future profitability and on the firm's future risk. Given the magnitude of uncertainty, the soft unverifiable information that former equity holders have is likely to provide a very substantial advantage . . . . The role an infor-

available information severely limit outsiders' abilities to gauge the reorganized debtor's value effectively and, therefore, decrease their willingness to participate in the auction, but it also increases the likelihood that high bids by those outsiders "may simply be erroneous overvaluations."[168] Perhaps, even more significantly, this lack of knowledge on the reorganized business often leads to underbidding, which, in turn, forces the courts to evaluate the equity retained under the "new value" plans: something auctions are presumably designed to prevent.[169] All in all auctions seem to allow, and even promote to

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> mation imbalance may play is exacerbated in the context of reorganizations when compared with the above situations [of insider trading]. Reorganized firms tend to have more debt and tend to fail with greater frequency than their non-reorganized counterparts. As a result, an insight into a firm's prospects which would ordinarily be irrelevant could substantially influence valuation.

Georgakopoulos, *supra* note 156, at 147-48. Professor Georgakopoulos explained that even a 15% variation in the projected outcomes of the reorganized entity can lead to serious, and potentially disastrous, misbidding by outsiders. *Id.* at 148. Others have agreed with that logic, noting that the difficulty third parties face lies in the fact that a number of uncertainties must be taken into account before bidding. Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 1986 J. LEGAL STUDIES 127, 136. Professor Markell contended that "the amount the old equity holders bid gives outsiders a certain degree of knowledge as to the true value of the interests at stake." Markell, *supra* note 13, at 110-11. While that claim has some validity, there still remains a wide range of uncertainties that could deter outsiders from bidding. Baird, *supra*, at 136.

Professor Skeel further noted that most willing buyers would be those in the same field, but should the difficulties that led to the existing debtor's downfall be industry-wide those other businesses would not be in a position to participate in any such auction. Skeel, *supra* note 156, at 477.

[168] Georgakopoulos, *supra* note 156, at 148-49. According to Professor Georgakopoulos:

> Falsely high bids are undesirable regardless of whether they provide safe capitalization. They waste resources, and, if not corrected by a voluntary sale or redeployment of the assets to their most valuable use, will waste the bankruptcy system's resources again when the firm eventually fails. While it is certainly not within the purview of bankruptcy policy to prevent valuation errors, it is not sound policy to invite them.

Id. at 149.

[169] *Id.* Professor Georgakopoulos added that underbidding may not, in fact, be indicative of the true value of the reorganized debtor's equity and, therefore, may not be a sign that the old equity holders' proposal is worthy of approval. *Id.* Rather, in these situations, the courts must still analyze the value of the retained

some degree, insider trading by those "in the know."[170]

c. Conclusions

One must admit that the auction process could potentially ensure that old equity holders do not retain equity interests at a bargain.[171] Indeed, one cannot avoid the conclusion that some form of competitive bidding must exist in order truly to determine whether those old equity holders have received a bargain.[172] However, the disparity of information prevents the auction, at least in its present form, from being an effective tool in maintaining fairness in the sale of equity interests[173] and in bringing market value for those interests.[174] Obviously,

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equity interests to determine whether the old equity holder have received those interests at a bargain price. *Id.* Of course, as a number of scholars have indicated, valuing these interests remains "difficult (if not impossible) to measure" and then to "reduce [that measure] to monetary terms." Powlen & Wuhrman, *supra* note 12, at 311. *See also* Miller, *supra* note 14, at 1018-19 (discussing difficulty courts face in determining value of equity interests). The difficulty lies in the fact that these retained equity interests include "intangible" and "speculative" benefits. Powlen & Wuhrman, *supra* note 12, at 311. Courts could easily misjudge the debtor's seemingly high bid and allow the debtor to retain equity interests at a bargain. Georgakopoulos, *supra* note 156, at 149. Unfortunately, at that point, the debtor becomes an "unassailable [purchaser] for full value." *Id.*

[170] *Id.* at 149-50. Interestingly, Professor Georgakopoulos observed that those supporting mandatory auctions are the same individuals who promoted unrestricted insider trading. *Id.* at 150. Only in an "unrealistically perfect market" can mandatory auctions work. *Id.*

[171] *Id.*

[172] *In re* Homestead Partners Ltd., 197 B.R. 706, 715 (Bankr. N.D. Ga. 1996). *See also In re* BMW Group 1, Ltd., 168 B.R. 731, 735 (Bankr. W.D. Okla. 1994) (holding that plan must be exposed to market forces to determine market value). The need for a market test becomes even more apparent when one realizes that old equity holders will be retaining a number of intangible benefits. *In re Homestead Partners*, 197 B.R. at 715.

[173] *See supra* note 166 and accompanying text.

[174] "Market value" has been defined as

> [t]he highest price a willing buyer would pay and a willing seller accept, both being fully informed, and the property being exposed for a reasonable period of time. . . . The market value of an article or piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction of a sale forced by the necessities of the owner. . . .

BLACK'S LAW DICTIONARY 971 (6th ed. 1990). Thus, as is evident in that definition, courts that force debtors to conduct auctions only "[invite] numerous potential abuses in circumstances where information cannot be shared evenly."[175]

D. Sever Exclusivity

An even more attractive suggestion has been to "uncouple exclusivity and new value."[176] Under this proposal, the debtor's ability to prevent creditors and other interested outsiders from proposing competing reorganization plans would be eliminated at the moment the debtor put forth its "new value" plan.[177] Upon the severing of this right of the debtor, others

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there must be full knowledge by all those competing and bidding for the equity interests in order to ensure the full market value is obtained, yet, with auctions, full knowledge does not exist.

[175] Georgakopoulos, *supra* note 156, at 149.

[176] TABB, *supra* note 4, at 879. A small number of legal scholars have made similar proposals. *See, e.g.,* Markell, *supra* note 13, at 118-19; Adams, *supra* note 77, at 1486-88; Leonard M. Rosen, *Book, Chapter and Worse: Chapter 11 Needs a Rewrite,* BUS. LAW TODAY, July-Aug. 1992, at 47, 49; Miscioscia, *supra* note 7, at 948-51. As another commentator suggested, "Exclusivity is inconsistent with new value principles." Strub, *supra* note 45, at 257. Strub added that exclusivity "is a monopoly power that creates economic inefficiency and deadweight loss." *Id.* at 232. However, by following Professor Tabb's approach, Strub declared that those problems can be alleviated and that a beneficial bidding war between the debtor and unsecured creditors can ensue. *Id.* at 232-33. In essence, the balance of power established in the Code would be maintained by allowing both sides to compete for these equity interests. Markell, *supra* note 13, at 118.

Some scholars have declared that the proposal of a "new value" plan constitutes sufficient "cause," under § 1129(d) of the Bankruptcy Code, to allow for this termination of exclusivity. Markell, *supra* note 13, at 118. *See also* Adams, *supra* note 77, at 1487-88 (arguing that filing of "new value" plan "might arguably constitute just cause"); Miscioscia, *supra* note 7, at 949 (same). Should courts disagree others have noted that a debtor can always waive its right of exclusivity. Salerno, *supra* note 19, at 1.

Were the bankruptcy court to refuse to terminate the exclusivity period the debtor could, in essence, accomplish the same result by merely allowing the 120-day period to pass. *Id.* The debtor could file its "new value" plan on the 121st day, while creditors would be forced to play "catch-up." *Id.* Of course, this advantage would likely be eliminated by wise and alert creditors who would recognize the debtor's strategy, but, nonetheless, the debtor could satisfy the mandates of *203 North LaSalle Street Partnership* by allowing, through its own strategic inactivity, competing plans to be filed.

[177] TABB, *supra* note 4, at 879. Professor Czarnetzky similarly explained that exclusivity should expire upon the presentation of a "new value" plan. Czarnetzky,

would then be given the opportunity to offer alternative proposals.[178] Subsequently, creditors would then be free to vote upon the competing plans.[179] Should there be no competing plans

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supra note 155, at 2999.

Recently, the National Bankruptcy Review Commission ("Commission") recommended that this severance of exclusivity should not, as Professor Tabb urged, occur immediately upon the presentation of the "new value" plan but, rather, upon the debtor's filing of such a plan. Dunaway, *supra* note 16, at 42. The Commission's approach reflects concern that the termination of exclusivity at the time of the proposal will not adequately protect the rights of debtors. *Id.* Critics of the Commission's suggestion have stated that "[o]nce exclusivity is lifted, creditors must have time to obtain information and develop an alternative plan, which causes more delay, expense and lawyers' fees." *Id.*

[178] TABB, *supra* note 4, at 879. The severing of exclusivity would then allow the debtor to gain confirmation of a "new value" plan. *Id.* One bankruptcy court in Tennessee recently took this approach. *In re* Jackson Television, Ltd., No. 1-87-01476 (Bankr. E.D. Tenn. May 11, 1998). In that unreported case, the court held that there could be no cramdown of a "new value" plan unless creditors and other interested outsiders had the chance to propose competing plans. *In re Jackson,* No. 1-87-01476.

The National Bankruptcy Review Commission seemed to prefer this method over the auction process. Dunaway, *supra* note 16, at 42. Unlike with the severing of exclusivity, there still remains the potential for "self-dealing" in the auction process. Trost, *supra* note 79, at 483. Additionally, the auction process seems to limit the courts' ability to determine whether the winning bid is sufficient. *Id.*

As Professor Czarnetzky noted, courts would need to establish some appropriate time period within which competitors could make proposals. Czarnetzky, *supra* note 155, at 2999.

[179] Czarnetzky, *supra* note 155, at 2999. Should both plans be approved by creditors, and should both plans be confirmable, Professor Markell maintained that the creditor plan should be implemented. Markell, *supra* note 13, at 121. Professor Markell suggested that this result should occur because creditors who "have priority in the debtor's assets . . . should be able to choose the form of their payment." *Id.* Courts seem to have accepted this logic and give great weight to the desires of creditors. *In re* Bedford Springs Hotel, Inc., 97 B.R. 831, 834 (Bankr. W.D. Pa. 1989). At the same time, however, nothing requires a court to confirm a plan that meets all the technical requirements for confirmation simply because creditors have voted in favor of its passage. *In re* Rolling Green Country Club, 26 B.R. 729, 735 (Bankr. D. Minn. 1982). *See also In re* Turner Engineering, Inc., 109 B.R. 956, 960-61 (Bankr. D. Mont. 1989) (noting that court had to respect creditor preferences but did not have to confirm creditor-preferred plan).

At least one commentator has criticized this "termination of exclusivity" approach, claiming that creditors will be "forced" to "compare apples and oranges." Epling, *supra* note 104, at 347-48. Based on this potential difficulty alone Epling found the auction process to be a better approach. *Id.* at 348. Unfortunately, Epling failed to expand upon this vague assertion, and one cannot help but quesoffered the debtor would then be permitted to put the "new value" proposal into effect.[180]

Obviously, this approach would ensure that there has been a market test of the valuation of the assets being retained, as is the case in the auction process, but would, at the same time, avoid many of the pitfalls of the auction. In essence, the opportunity to offer a competing plan—whether based solely upon the debtor's own plan or upon the outsider's independent calculations—would provide creditors and other interested outsiders the same benefits as would the ability to bid at a public auction. With the debtor's proposal available for inspection, others could weigh the pros and cons of attempting the reorganization of the entity with full knowledge of the business' financial position. Thus, the valuation problems of auctions would not deter outside competition, and the goals espoused by the Court in *203 North LaSalle Street Partnership* would be met.

V. THE POTENTIAL IMPACT OF *203 NORTH LASALLE STREET PARTNERSHIP* UPON CASES SUCH AS *IN RE TREASURE BAY*

After having delved into the Supreme Court's recent ruling in *203 North LaSalle Street Partnership* and having discussed what type of "new value" plan could potentially survive scrutiny under that decision, this Comment proposes to conduct an

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tion whether such circumstances would actually arise to any great degree so as to truly render the "termination of exclusivity" approach unworkable.

[180] Czarnetzky, *supra* note 155, at 2999. It would only seem logical to require a debtor's "new value" plan or a creditor's plan to undergo review, following approval by creditors, by the bankruptcy court to determine feasibility prior to confirmation even under this suggested approach. Indeed, a creditor voting on two reorganization plans may tend to opt automatically in favor of a debtor's proposal, simply because the creditor assumes it to be more feasible, or a creditor's proposal, simply because the voting creditor harbors unfounded prejudices against the debtor, without truly analyzing the merits of either. Certainly, these prejudices cannot be easily reversed, and, in reality, truly competitive voting may not be achievable given the various relationships of creditors involved. However, by reviewing the creditor-approved plan, the court could counteract these flaws in the voting process. While such a procedure might add some extra expense to the process, having the bankruptcy court scrutinize creditor-approved proposals would alleviate these problems by encouraging plan proponents to put forth a truly feasible plan rather than one designed solely to garner creditor support.

academic exercise using "real world" facts to provide an example of the impact the Court's holding will have upon future bankruptcy filings. In conducting this analysis, this Comment will examine *In re Treasure Bay*, an intriguing case involving debtors from the casino industry and a factual situation that will allow a full exploration of the lessons of *203 North LaSalle Street Partnership*.

A. *Factual Background*

After certain creditors filed an involuntary Chapter 7 petition against Treasure Bay Corporation ("TBC"),[181] TBC filed a voluntary Chapter 11 petition on January 10, 1995, thereby converting the case into a voluntary Chapter 11 reorganization.[182] Its parent, Treasure Bay Gaming and Resorts, Inc. (TBGR), a Delaware corporation, also filed a Chapter 11 petition at that time.[183] On May 17, 1995, TBC and TBGR (debtors) filed a Joint Plan of Reorganization.[184] In August 1995, well after the debtors' 120-day exclusivity period passed, the bankruptcy court denied the debtors any further extension of this exclusivity period, thereby enabling other interested parties to file competing plans.[185] One year later the court initiated a confirmation hearing[186] to determine the merits of the debtors' plan, and at the hearing, the court found that plan to be unconfirmable.[187] Following that ruling, the court ordered all interested parties to resubmit any amended plans to the creditors for a vote.[188] The debtors, along with their indenture trustee, First Trust National Association ("First Trust"), presented a modified plan[189] under which a small group of investors would insert $9 million in cash and real property in return for ninety percent of the reorganized entity's common stock.[190]

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[181] Treasure Bay Corporation was a Mississippi corporation owning and operating the Treasure Bay Biloxi casino in Biloxi, Mississippi, and the Treasure Bay Tunica casino in Tunica, Mississippi. *In re* Treasure Bay Corp., 212 B.R. 520, 524 (Bankr. S.D. Miss. 1997).

[182] *In re Treasure Bay*, 212 B.R. at 424.

[183] *Id.* Both bankruptcy cases were jointly administered. *Id.*

[184] *Disclosure Statement for Amended Joint Alternative Plan of Reorganization as Proposed by Santa Fe Gaming Corp.*, 1 (Apr. 24, 1996) (on file with author).

[185] *Id.* at 1-2. Two such competing plans were presented. The Santa Fe Gaming Corporation filed its plan at the end of August 1995. *Id.* at 2. Several months later in 1996, First Trust National Association submitted an additional competing plan. *First Amended Disclosure Statement for the Ad Hoc Comm. of Bondholders' and First Trust Nat'l Ass'ns (In Its Capacity as Indenture Trustee) Joint Plan of Reorganization*, 1 (May 7, 1996) (on file with author).

[186] The bankruptcy court instituted this proceeding because the debtors' plan had received a majority of creditor votes in the early part of summer 1996. *Disclosure Statement for Amended Joint Alternative Plan of Reorganization Proposed by Santa Fe Gaming Corp. Supported by Roy Anderson Corp.*, 11 (Feb. 4, 1997)

(on file with author) [hereinafter *Santa Fe's Second Plan*].

[187] *In re Treasure Bay*, 212 B.R. at 524. That initial plan failed mainly because it appeared to the court not to be feasible. *Id.* at 538. Agreeing with the expert witness of the debtors' competitors, the court noted that the plan was thinly capitalized and placed the debtors in a highly leveraged position. *Id.* Compounding the problem was the impending 40% increase in slot capacity by other casinos. *Id.*

Instead of examining the pending competing plans, the court instructed the parties to present new plans to the creditors for a vote. *Santa Fe's Second Plan, supra* note 186, at 11.

[188] *Id.* at 2.

[189] *In re Treasure Bay*, 212 B.R. at 524. The court ruled that collateral estoppel did not bar the filing of this additional plan. *Id.* at 539. Even if the doctrine of collateral estoppel was applicable in general, the court held that this new plan sufficiently differed from the other to prevent the doctrine from having any effect in this instance. *Id.*

Although Santa Fe highly contested this matter, the bankruptcy court ruled that the debtors' amended plan had several important changes that rendered the doctrine of collateral estoppel inapplicable. *Id.* at 538. The court pointed to the following factors in reaching this conclusion:

> (1) New First Mortgage Notes in the amount of $27,250,000, instead of the prior plan amount of $26,250,000; (2) Five PIK interest payments, wherein the debtor can elect to defer payment on the notes, giving the debtors an extra $1,728,000 cushion; (3) The debtors have options available to them through Shoreline on the basin property and the Captain's Inn property; (4) The debtors have the ability to borrow an additional $2.250,000 from First Trust; and (5) First Trust is a proponent of the pending plan. Thus, the debtors have a working relationship with their lender, instead of the adverse relationship that once existed.

Id. at 538-39.

[190] *Id.* at 525. A number of those investors owned common stock in TBGR at the date of the filing of the Chapter 11 petition. *Id.* The $9 million contribution consisted of $4.5 million in cash along with the Budget Inn hotel complex located near the Treasure Bay Biloxi casino. *Id.* The court ruled that "[t]he real estate represent[ed] a tangible and marketable asset that could be converted to cash if necessary." *Id.* Based on testimony by the debtors' president and chief executive

Likewise, Santa Fe Gaming Corporation ("Santa Fe"),[191] the manager of the Treasure Bay for the seven-month period preceding the filing of the Chapter 11 petition and one of its major creditors, filed a competing plan of reorganization.[192] Under

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office as to the Budget Inn's strategic location and its usefulness to the debtors the court found that the property's value was at least $4.5 million as suggested by the debtors. *Id.* at 525-26. Santa Fe objected, noting the lack of any contractual agreement between the debtor and Shoreline, the actual owner of the Budget Inn property, under which Shoreline would be required to contribute that property. *Id.* at 544-45. The bankruptcy court overrruled Santa Fe's contention, stating that there was "sufficient certainty" the property would ultimately be contributed. *Id.*

A second component of the plan provided that certain First Mortgage Noteholders would receive 10% of the reorganized entity's stock in partial satisfaction of their claims against the debtors. *Id.* at 525.

Six objections were initially filed to confirmation of the debtors' plan. *Id.* at 524. After several settlements, however, only two objections—those of Santa Fe and the Roy Anderson Corporation, one of a number of construction contractors asserting liens for labor and materials—remained at the time of the trial. *Id.*

Despite the views of the opponents of the debtors' plan the court determined that the plan was feasible. *Id.* at 530-31. The court noted that, due to the impending opening of two new casinos in the Biloxi area, the proposed cash infusion was necessary to enable the debtors to improve their facilities and, thereby, continue to maintain their position when those competitors entered the Biloxi market. *Id.* In reaching this conclusion, the court stressed that

> [a] group of sophisticated, knowledgeable businessmen who are intimately familiar with the operations of the debtors, some of whom have already lost considerable f[u]nds, are willing to invest $9 million of new equity in the property. At the same time, the debtors will assume new debt of at least $35 million. . . .

Id. at 547.

[191] Santa Fe, a Las Vegas, Nevada, based company, owned the Santa Fe Hotel and Casino in Las Vegas and the Pioneer Hotel Gambling Hall in Laughlin, Nevada. *Id.* at 534. Previously, the company operated the Sahara and Hacienda casinos in Las Vegas but sold them in 1996. *Id.*

[192] *Id.* at 524. Santa Fe's plan requested that it be treated as two separate plans, stating that, if the plan could not be met as to TBGR, it would seek confirmation as to TBC only. *Id.* at 535. Under Santa Fe's proposal, a new entity would be created and controlled by Santa Fe. *Id.* This entity would then purchase 100% of the stock in TBC, should there be reorganization only as to TBC, for $10 million in cash. *Id.* The proposal called for implementation by means of the issuance of new notes to the First Mortgage Noteholders. *Id.*

As for the feasibility of the plan, the court observed that Santa Fe had based its plan on the projections of the debtors, with only a few minor deviations, and concluded that Santa Fe would be able to meet its projections. *Id.* at 538.

Santa Fe's proposal, Santa Fe would essentially buy 100% of the reorganized business' stock for the purchase price of $10 million in cash.[193]

B. *Holding of* In re Treasure Bay

Even though a majority of creditors supported the debtors' amended plan the bankruptcy court proceeded to analyze the confirmability of both the debtors' and Santa Fe's plans.[194] In regard to the debtors' plan, the main hurdle to confirmation was a provision that permitted retention of stock by old equity holders.[195] However, the court expressly held that the "new value" exception remained viable,[196] leaving the debtors with the sole task of convincing the court that its plan satisfied the five requirements of the exception.[197] After thoroughly reviewing the debtors' plan, the court held that it fulfilled those five mandates and declared that, therefore, it could be confirmed.[198] While the debtors' plan received the court's approval, the Santa Fe plan did not.[199] Even had the court found the Santa Fe plan confirmable the court noted that only one proposal could be enacted,[200] and, given the overwhelming approval shown by creditors for the debtors' plan, the court added that Santa Fe's proposal could not have won out in the instant case.[201] Accordingly, the court confirmed the debtor's proposal.[202]

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[193] *Id.* at 535. At the time of trial, only two objections—those of First Trust and of the unsecured creditors committee—remained to confirmation of the Santa Fe plan. *Id.* at 525.

[194] *Id.* at 524.

[195] *Id.* at 544.

[196] *Id.* The *In re Treasure Bay* court followed an unreported 1994 decision from the Bankruptcy Court for the Northern District of Mississippi in which another "new value" plan received confirmation. *Id.* (citing *In re* Bluff Springs Paper Co., Ltd., No. 93-21310, 1994 WL 928894, *2 (Bankr. N.D. Miss. Dec. 21, 1994)).

[197] *In re Treasure Bay*, 212 B.R. at 544. As indicated previously in this Comment, a contribution must be (1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization, and (5) reasonably equivalent to the value or interest retained in order to satisfy the "new value" exception. *Id.* Clearly, the addition of $4.5 million in cash and the Budget Inn property, which did not previously belong to the debtor, fulfilled the "new" component. *Id.* Second, the court deemed the $9 million contribution "substantial" in comparison to the estimated value of the reorganized debtor. *Id.* Estimates of the value of the reorganized entity ranged from $23 million to $53 million, and the court could not find a $9 million contribution a token cash infusion based on that range of numbers. *Id.* Further, despite conflicting testimony that indicated the Budget Inn property might not immediately be contributed the court determined that the "money or money's worth" factor was easily met. *Id.* at 544-45. Next, the court held that the evidence tended to show that the contribution was very necessary if the reorganization were to be successful. *Id.* at 545. The court stated that the cash would be needed to pay certain debts and operating expenses and that the Budget Inn property would be necessary to connect two disjointed pieces of property owned by the debtor. *Id.* As for the final factor, the court agreed with the debtor that the proposed contribution was reasonably equivalent to the interests retained. *Id.*

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[198] *Id.* The court additionally determined that the debtors' plan met, by a preponderance of the evidence, the other requirements of § 1129 of the Code. *Id.* at 547.

[199] *Id.* at 546. The bankruptcy court found three grounds for rejecting Santa Fe's plan. *Id.* First, the court noted that Santa Fe planned to pay the First Mortgage Noteholders either $17.5 million in cash or a $20 million note and that, while the true amount of the Noteholders' secured claim could not be determined, the claim was at least worth $21 million. *Id.* Thus, the court deemed the plan "not 'fair and equitable' with respect to the secured claims of the Noteholders." *Id.* Second, the court found Santa Fe's plan to "discriminate[] unfairly with respect to the unsecured claims of the Noteholders." *Id.* Finally, the court determined the plan unfairly discriminated against all other general unsecured creditors. *Id.* Under Santa Fe's plan, the Roy Anderson Corporation was to receive $3.5 million for services rendered when the corporation had engaged in work that was only valued at $2,694,153. *Id.* Thus, the court held that such payments violated the "fair and equitable" requirement of the Code. *Id.*

[200] *Id.* at 548. The Code, in fact, prevents a court from confirming more than one plan. 11 U.S.C. § 1129(c) (1994). It would seem proper for the court to consider, prior to confirmation, the feasibility of the creditor-approved Chapter 11 plan in order to negate any flaws in the creditor voting process. *See supra* note 180 and accompanying text.

[201] *In re* Treasure Bay, 212 B.R. at 548. The court added that only two impaired classes of creditors voted in favor of Santa Fe's plan with all other classes rejecting it, while all but one class accepted the debtors' proposal. *Id.* Moreover, creditors, in particular the First Mortgage Noteholders—the principal secured creditor—received more under the debtors' plan. *Id.* Finally, the court stressed that the equity security holders also favored the debtors' plan, thus leaving the court with the strong impression that, even were Santa Fe's plan confirmable, the debtors' proposal deserved confirmation over the Santa Fe plan. *Id.*

[202] *Id.*

C. *Effect of* 203 North LaSalle Street Partnership

Reviewing the facts and the holding of *In re Treasure Bay*, one might come to the conclusion that the decision did not run afoul of the Supreme Court's recent ruling in *203 North LaSalle Street Partnership*. Indeed, while the court in *In re Treasure Bay* did not sever the debtors' exclusive right to file a plan of reorganization as this comment's author, like others before, have suggested,[203] the court did, as a result of the passage of the 120-day exclusivity period, unknowingly provide for some sort of market test by allowing the debtors' creditors to put forth competing plans that were then voted upon by the different classes of creditors. True, the competing plans did not gain acceptance in the instant case, but interested creditors, and presumably any other interested third parties,[204] had the opportunity to vie for the equity interests in the reorganized debtor.

Thus, at first glance, the *In re Treasure Bay* decision appears to have satisfied the concern of the Supreme Court in *203 North LaSalle Street Partnership* of ensuring that some form of market evaluation occurred. However, a more thorough reading of *In re Treasure Bay* reveals a number of flaws. Chiefly, the bankruptcy court did not sever the debtors' right of exclusivity at the time of the filing of the "new value" plan.[205]

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[203] *See supra* notes 176-80 and accompanying text.

[204] In order to have a true market test, it would seem that all interested parties, whether creditors of the debtor or not, should be permitted to vie for the equity interests in the reorganized business once exclusivity expires. While actual participation by non-creditors may be rare, allowing other outsiders to propose competing plans, especially in such highly competitive industries as gaming, would potentially benefit creditors and society as well by enabling those with expertise in the particular business being reorganized to take part in that reorganization.

[205] While some, including the National Bankruptcy Review Commission, have indicated that exclusivity should expire upon the filing of a "new value" plan, other scholars have stated that the right of exclusivity should be removed the instant a "new value" plan is simply presented. *See supra* note 177 and accompanying text. In the instant case, it remained unclear as to precisely when the debtors actually presented the "new value" plan, and, in order to simplify matters, this Comment assumes that "presentation" and "filing" occurred simultaneously.

Rather, the court preserved that right of exclusivity for three months following the presentation and filing of the debtors' plan.[206] As a result, interested creditors found themselves faced with a dilemma of deciding whether or not to spend a large sum of money in preparing a competing plan without fully knowing if such a plan would be permitted or, rather, if the debtors' plan would be confirmed in the meantime.[207] Thus, while Santa Fe was able to put forth a plan only a few weeks after the expiration of exclusivity,[208] the debtors had, at a minimum, a three-month advantage over those creditors desiring to compete for the interests in the reorganized entity. Although perhaps only a minimal advantage, that three-month period afforded the debtors a sufficient "head start" in the race for seeking creditor approval so as to render the protection provided creditors inadequate under *203 North LaSalle Street Partnership*.

Some might further suggest that the *In re Treasure Bay* court, by not actively seeking other plans, did not take adequate steps to ensure that the debtors had not received a bargain; however, *203 North LaSalle Street Partnership* did not require, and rightfully so, the bankruptcy court to take such an active role in the solicitation of competing plans. Rather, what *203 North LaSalle Street Partnership* demands is merely that outsiders have the right to make proposals or, in other words, to bid on the equity interests at stake.[209] Whether or not outsiders actually become involved has no bearing upon the sufficiency of the market test of the value of those equity interests. However, under a *203 North LaSalle Street Partnership* regime, the failure of the court in *In re Treasure Bay* to terminate exclusivity immediately upon the filing of the debtors' "new value" plan would be fatal to the decision.

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[206] *See supra* notes 184-85 and accompanying text.

[207] The Supreme Court has really offered no guidance as to the proper procedures to follow once a debtor presents or files a "new value" plan, and, as a result, creditors, at present, do face enormous uncertainty. Perhaps the main drawback to the "termination of exclusivity" approach is, in fact, this current uncertainty, but by adhering to this suggested procedure, courts could eliminate, or at least greatly reduce, the reluctancy of creditors to propose competing plans.

[208] *See supra* note 185 and accompanying text.

[209] "Bidding" here is not used in its commonly understood meaning. Rather, it refers to the right to compete against the debtor for the equity interests of the reorganized business by putting forth a rival plan and seeking creditor support.

If the bankruptcy court in *In re Treasure Bay* had simply permitted outsiders to offer opposing plans beginning on May 17, 1995, the ruling would have fulfilled the requirements espoused by the Supreme Court in *203 North LaSalle Street Partnership*. Yet, a three-month delay hindered the ability of Santa Fe and other interested creditors truly to be "competitive"[210] and, thereby, violated the holding of *203 North LaSalle Street Partnership*.

VI. CONCLUSION

In *203 North LaSalle Street Partnership*, the United States Supreme Court left unanswered the question of whether the "new value" exception to the absolute priority rule of Chapter 11 bankruptcy still possessed vitality. Realizing the exception's potential benefits, the Court did not altogether preclude confirmation of "new value" plans. Rather, what the Court suggested was merely that old equity holders could not utilize the exception if their plan of reorganization went untested by market forces.[211] In the future, debtors and bankruptcy courts would be wise to take heed of these limitations placed upon the exception by the Court and follow the "severance of exclusivity" procedure promoted by a growing number of bankruptcy scholars.[212] By severing the debtor's exclusive right to propose a

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[210] The Supreme Court very strongly emphasized in *203 North LaSalle Street Partnership* that it approved of only those decisions "[]tested by competitive choice." Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, 119 S. Ct. 1411, 1424 (1999).

[211] *See supra* notes 128-31 and accompanying text.

[212] *See supra* notes 176-80 and accompanying text.

Chapter 11 plan, bankruptcy courts will ensure interested creditors have the opportunity to offer competing plans and vie for the equity in the reorganized entity and, as a result, will alleviate the Court's concerns in *203 North LaSalle Street Partnership*.

Tim Peeples

WHAT IS SUBSTANTIAL COMPLIANCE ANYWAY? EXAMINATION OF THE PRESENT STATUS OF THE NOTICE OF CLAIM REQUIREMENTS OF SECTION 11-46-11 IN LIGHT OF MISSISSIPPI'S SHIFT FROM STRICT TO SUBSTANTIAL COMPLIANCE IN *REAVES V. RANDALL* AND *CARR V. TOWN OF SHUBUTA*

INTRODUCTION

Since the Mississippi State Legislature officially ended sovereign immunity from suit by passing the Mississippi Tort Claims Act in 1993[1] no provision of this Act has generated more confusion, controversy, or litigation than the notice of claim requirements set out in section 11-46-11 of the Mississippi Code.[2] These notice of claim provisions require that before a claimant can initiate an action against a governmental entity, the claimant must give notice of his or her claim to that governmental entity's chief executive officer at least ninety days before filing suit[3] and must include certain information in that notice of claim. The controversy surrounding this statute is whether strict or substantial compliance with its provisions is required.[4] Starting in 1997 with the Mississippi

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[1] MISS. CODE ANN. §§ 11-46-1 to -23 (1993). *See also* Richard Smith-Monohan, Comment, *Sovereign Immunity in Mississippi 1982 to 1995: A Practical Tool for Lawyers and Judges*, 16 MISS. C. L. REV. 215, 218-19 (Fall 1995) (stating that in 1993's regular session, Mississippi Legislature enacted "comprehensive sovereign immunity" that supplanted previous statute, which was held unconstitutional by Mississippi Supreme Court).

[2] J. James Fraiser, *A Review of Issues Presented by § 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statue of Limitations*, 65 MISS. L.J. 643, 647 (1996). *See also* Jim Fraiser, *An Analysis of Recent Decisions Pertaining to the Mississippi Tort Claims Act, § 11-46-11*, MISS. LAWYER, Sept. 1998, at 11.

[3] MISS. CODE ANN. § 11-46-11 (1998).

[4] Fraiser, *A Review of Issues*, *supra* note 2, at 647.

Supreme Court case *City of Jackson v. Lumpkin*,[5] Mississippi initially adhered to strict compliance with the notice requirements of section 11-46-11.[6] This strict interpretation enabled counsel for the state, municipalities, and political subdivisions to get many claims against these entities dismissed for technical violations of the statute[7] and served as a trap or "pitfall" for unknowing plaintiff's counsel, who were unfamiliar with the intricacies of section 11-46-11.[8] This strict interpretation also ensured predictability in the statute's application. However, all this changed in late 1998 with the Mississippi Supreme Court's holding in *Reaves v. Randall*[9] and, more recently, in *Carr v. Town of Shubuta*,[10] which shifted Mississippi to a substantial compliance interpretation of section 11-46-11.[11] Now, in light of these two decisions and the ones that followed, there is uncertainty in the legal community as to what actually constitutes substantial compliance with the notice requirements of section 11-46-11.

This comment examines (1) the recent Mississippi Supreme Court decisions that have moved Mississippi to a substantial compliance state, (2) why it made the move, (3) the implications of the move, and (4) attempts to decipher from these recent decisions what exactly constitutes "substantial compliance" with the notice requirements of section 11-46-11. Part I outlines a brief history of the Mississippi Tort Claims Act and the actual notice requirements of section 11-46-11. Part II outlines the era of strict compliance in Mississippi and indicates other jurisdictions that strictly comply with the notice provisions of their Tort Claims Acts. Part III examines Mississippi's recent move to substantial compliance with its notice provisions and the basis for the shift. Part IV explains the implications of Mississippi's shift to substantial compliance and outlines what actually constitutes substantial compliance under the current supreme court precedent.

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[5] 697 So. 2d 1179 (Miss. 1997).

[6] *Lumpkin*, 697 So. 2d at 1181-82. The court concluded that in waiving sovereign immunity, the Legislature included mandatory language that it intended to be complied with before suit could be brought. *Id. See* Carpenter v. Dawson, 701 So. 2d 806, 808 (Miss. 1998) (following *Lumpkin* by stating that legislative requirement that notice provisions "shall" be followed evidenced that notice statute should be "strictly enforced"). *See also* Fraiser, *A Review of Issues*, *supra* note 2, at 650.

[7] *See Carpenter*, 701 So. 2d at 806 (stating that trial court granted summary judgment in favor of city for plaintiff's failure to comply with notice requirements of § 11-46-11). *See also* Holmes v. Defer, 722 So. 2d 624, 625 (Miss. 1998) (dismissing complaint against county for failure to file notice of claim).

[8] *Carpenter*, 701 So. 2d at 808.

[9] 729 So. 2d 1237 (Miss. 1998).

[10] 733 So. 2d 261 (Miss. 1999).

[11] *See* Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitations of Liability*, 68 MISS. L.J. 703, 710 (1999) (stating that after *Reaves* and *Carr*, Mississippi Supreme Court "may have recently reversed itself" in regards to its view of strict interpretation of section 11-46-11). The notice provisions of section 11-46-11 were amended by the legislature to reflect some of the *Reaves* and *Carr* holdings and were signed by the governor into law on March 25, 1999. Thornburg v. Magnolia Reg'l Health Ctr., 741 So. 2d 220, 221 (1999).

I. MISSISSIPPI'S STATUTORY NOTICE REQUIREMENTS

A. *History of the Mississippi Tort Claims Act*

The ancient doctrine of sovereign immunity from liability for tortious conduct developed in Mississippi around the middle 1800s[12] through a series of Mississippi Supreme Court decisions.[13] This "judicially created" immunity from suit existed for almost a century and a half.[14] Then, in 1982, the Mississippi Supreme Court abolished its self created sovereign immunity in the case of *Pruett v. City of Rosedale*.[15] In *Pruett*, the court noted from the "outset" that it was now time to abrogate sovereign immunity in Mississippi subject to certain exceptions.[16] The court then held that it was the responsibility of the legislature, rather than the judiciary, to carry out the particulars of the abrogation of sovereign immunity.[17]

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[12] Smith-Monahan, *supra* note 1, at 215. The idea of sovereign immunity came from the ancient belief that "the king could do no wrong." *Id.*

[13] *Id.* Mississippi first adopted the notion of sovereign immunity in *County of Yalobusha v. Carbry*, 11 Miss. 529 (Miss. 1844). The concept of immunity of the sovereign was further enhanced in subsequent cases. *See* Anderson v. State, 23 Miss. 459 (Miss. 1852). *See also* McKlemurry v. University Med. Ctr., 380 So. 2d 251 (Miss. 1980); Jones v. Knight, 373 So. 2d 254 (Miss. 1979); Berry v. Hinds County, 344 So. 2d 146 (Miss. 1977).

[14] Smith-Monahan, *supra* note 1, at 215.

[15] 421 So. 2d 1046 (Miss. 1982).

[16] *Pruett*, 421 So. 2d at 1046. The court noted that sovereign immunity was

The legislature subsequently enacted a comprehensive sovereign immunity act pursuant to the *Pruett* decision.[18] However, the legislature also enacted a statutory provision in this Act that applied pre-*Pruett* sovereign immunity case law to all claims until the immunity statute took effect.[19] The legislature then delayed the effective date of the statute a year for each year through 1992.[20] Finally, in 1992, in *Presley v. Mississippi State Highway Commission*,[21] the Mississippi Supreme Court found the statute that mandated application of pre-*Pruett* sovereign immunity law unconstitutional.[22] Subsequently, the Mississippi legislature passed another Compre-

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out of date and obsolete in the modern legal and social climate and that almost all of the states had done away with the ancient doctrine. *Id.* at 1047. The court then cited specific examples of states that had abolished sovereign immunity in some shape or form. *Id.* at 1048-50. However, the court upheld the historic common law immunities afforded to the legislative, executive, and judicial branches of government. *Id.* at 1052.

[17] *Id.* at 1051. Justice Bowling stated that "the judiciary is no longer the branch of government to supervise and control the extent to which persons with rightful claims" can bring suit against the sovereign; furthermore, "the problem is one our system of government places on the legislative branch." *Id.* Justice Bowling went on to state that due to inherent difficulties the legislature had some leeway in setting a timetable for carrying out the obligation of sovereign immunity. *Id.* at 1052. Accordingly, the court delayed the effective date of the legislature's abolishment of sovereign immunity until July 1, 1984. *Id.* at 1052.

[18] Smith-Monahan *supra* note 1, at 216. *See* MISS. CODE ANN. §§ 11-46-1 to -23 (1984).

[19] Smith-Monahan *supra* note 1, at 216. This statute essentially applied the law of sovereign immunity as it existed prior to the *Pruett* decision to all claims against the state and its political subdivisions. *Id. See* MISS. CODE ANN. § 11-46-6 (1987).

[20] Smith-Monahan *supra* note 1, at 216. *See also* Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1294 (Miss. 1992) (stating that Legislature had enacted and re-enacted Sovereign Immunity Act for four consecutive years, but delayed its application until following year in each re-enactment).

[21] 608 So. 2d 1288 (Miss. 1994).

[22] *Presley*, 608 So. 2d at 1295-96. The court held that, under the Mississippi Constitution, it was unconstitutional for the legislature in section 11-46-6 of the Mississippi Code to require the courts of Mississippi to apply the common law as it existed prior to the *Pruett* decision. *Id.* at 1296. Rather, the courts can only apply the common law as it presently exists. *Id.* at 1295-96.

hensive Sovereign Immunity Act[23] and made its provisions effective prospectively.[24] One of the statutes passed in this revised act was section 11-46-11 of the Mississippi Code.[25]

B. The Present and Former Section 11-46-11 of the Mississippi Code

Section 11-46-11 of the Mississippi Code sets out certain notice of claim requirements that a potential plaintiff must comply with before initiating suit against the State of Mississippi or one of its political subdivisions.[26] First, a plaintiff must file a notice of claim to the chief executive officer of the government entity ninety days before filing suit against that government entity.[27] Second, the statute requires that this notice of claim must be in writing and delivered in person or by registered or certified mail.[28] This notice of claim should also contain a short and plain statement of the facts upon which the claim against the entity is predicated on, such as (1) the circumstances surrounding the injury, (2) extent of injury, (3) time and place of the injury, (4) names of all persons known to be involved, (5) the amount of money damages sought, and (6) the residence of the person making the claim, both at the time of the accident and at the time of notice.[29] Third, the statute finally requires that all claims against a government entity must be initiated within one year of the alleged tortious act.[30] On March 25, 1999, in response to the recent Mississippi Supreme Court decisions in *Reaves v. Randall* and *Carr v. Town of Shubuta*, the legislature expanded the available officials that a notice of claim could be served upon.[31] The present controversy lies in whether strict or substantial compliance with these statutory notice provisions should be required.

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[23] MISS. CODE ANN. §§ 11-46-1 to -23 (Supp. 1993). *See* Smith-Monahan *supra* note 1, at 218-19.

[24] *Presley*, 608 So. 2d at 1299.

[25] MISS. CODE ANN. § 11-46-11 (1993).

[26] J. James Fraiser, *A Review of Issues*, *supra* note 2, at 647-48. The primary reason for requiring such a notice of claim is to avoid prejudice to the government entity by allowing the government entity sufficient time to (1) adequately investigate the claim, (2) determine liability, (3) correct any hazardous or dangerous condition, (4) encourage settlement of worthy claims, (5) plan an adequate defense to suit, (6) find evidence and witnesses while they still exist, (7) prepare to budget or take into account future liabilities, and (8) avoid senseless litigation expense. J. James Fraiser, Annotation, *Sufficiency of Notice of Claim Against Local Governmental Unit as Regards to Identify, Name, Address, and Residence of Claimant*, 53 A.L.R. 5th 617, 631-32 (1998).

[27] MISS. CODE ANN. § 11-46-11(1) (1998). Requiring the notice of claim to be served to the chief executive officer of the governmental entity sued avoids the uncertainty to both claimants and governmental entities alike by insuring that the correct official receives the notice.

[28] MISS. CODE ANN. § 11-46-11(2) (1998).

II. STRICT COMPLIANCE IN MISSISSIPPI

A. *Federal Tort Claims Act*

The Federal Tort Claims Act has a notice of claim prerequisite in 28 U.S.C. § 2675,[32] which is somewhat similar to section 11-46-11 of the Mississippi Code. The Federal Tort Claims Act also contains in § 2401(b) a two-year statute of limitations to present this notice of claim.[33] As with the other provisions of the Federal Tort Claims Act,[34] federal courts have interpreted both § 2675[35] and § 2401(b) strictly.[36]

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[29] MISS. CODE ANN. § 11-46-11(2) (1998).

[30] MISS. CODE ANN. § 11-46-11(3) (1998). However, the filing of a notice of claim required by section 1 of the statute tolls the statute of limitations for 95 days from the date that the chief executive officer of the state agency receives notice of the claim and 120 days from the date that the chief executive officer of a municipality or political subdivision receives notice of the claim. *Id.*

[31] MISS. CODE ANN. § 11-46-11(1) (Supp. 1998). The legislature included the city clerk as a party in which an acceptable notice of claim could be served when suing a municipality and allowed notice of claim to be served upon a county clerk when suing a county. *Id.*

[32] 28 U.S.C.A. § 2675 (1994). The statute states that an action may not be initiated against the United States unless the claimant first presents the claim to the appropriate federal agency and the federal agency at issue denies the claim. *Id.* This prerequisite of presenting the claim to the appropriate federal agency is analogous to section 11-46-11(1) of the Mississippi Code, which also requires a presentation of claims. *See* MISS. CODE ANN. § 11-46-11(1) (1998).

[33] 28 U.S.C.A. § 2401(b) (1994). This statute states, "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues. . . ." 28 U.S.C.A. § 2401(b). This statute also sets a statute of limitations of six years "after the right of action first accrues" to actions against the United States. 28 U.S.C.A. § 2401(a).

[34] *See* Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the*

B. Strict Compliance in Other Jurisdictions

Many of the states also require strict compliance with their notice of claim requirements before filing suit against the sovereign.[37] Some of these states have statutory notice of claim mandates similar to that of Mississippi's section 11-46-11.[38] For instance, some states require strict compliance with service to the statutory designated party to receive the notice of claim that is set out in section 11-46-11(1).[39] Both strict

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Federal Tort Claims Act: The Impact of Brockamp *and* Beggerly, 29 SETON HALL L. REV. 885, 885 (1999) (stating that Federal Tort Claims Act's statute of limitations are "jurisdictional prerequisites to suit" that must be complied with for waiver of immunity to apply); United States v. Beggerly, 529 U.S. 38, 48-49 (1998) (holding that Federal Tort Claims Act is jurisdictional; therefore, equitable tolling of statute of limitations cannot apply unless Congress specifically intended); United States v. Brockamp, 519 U.S. 347, 348-54 (1997). *See also* Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93-94 (1990) (stating that government waivers of sovereign immunity are usually construed narrowly); Honda v. Clark, 386 U.S. 484, 501 (1967) (holding that Supreme Court "has read procedural rules embodied in statutes waiving immunity strictly").

[35] *See* Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992). In *Cizek*, the Tenth Circuit held that the notice requirements of 28 U.S.C. § 2675 were jurisdictional and should be construed strictly. *Cizek*, 953 F.2d at 1233. A federal district court has also dismissed a suit because the suit was filed before any notice of claim under § 2675 was sent to the appropriate federal agency. Eure v. United States Postal Serv., 711 F. Supp. 1365, 1369 (S.D. Miss. 1989). *Eure* also held that the complaint itself could not constitute a notice of claim under § 2675. *Eure*, 711 F. Supp. at 1369.

[36] Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 MIL. L. REV. 1, 1 (1992). *See* Pascale v. United States, 998 F.2d 186, 193 (3d Cir. 1993); Lazarini v. United States, 898 F. Supp. 40, 44-45 (D.P.R. 1995) (holding that plaintiff's failure to present claim to agency within two-year period was fatal because notice requirements of § 2401(b) are strictly construed). *See also* Spannaus v. United States Department of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987) (holding that § 2401(a) statute of limitations must be strictly construed).

[37] Fraiser, *A Review of Issues*, *supra* note 2, at 654-66.

[38] *Id.* at 654-58. Massachusetts' statutory notice of claim requirements in its Tort Claims Act is analogous to Mississippi's section 11-46-11(1), regarding to who in the government entity may be served with notice of claim. *Id.* at 654-55. Furthermore, both California and Kansas content requirements of their notice of claim are similar to that of Mississippi. *Id.* at 657-58.

[39] *Id.* at 654-55. *See* Weaver v. Commonwealth, 438 N.E.2d 831, 834-35 (Mass.

and substantial compliance states require strict compliance as to the content of their notice of claims as listed in section 11-46-11(2).[40] Some states even consider actual notice or the complaint itself as insufficient compliance with the notice requirements of their Tort Claims Acts.[41]

C. *Strict Compliance in Mississippi*

Interestingly, after the "Revised" Mississippi Tort Claims Act was enacted in 1993, Mississippi's federal courts took the lead in interpreting the notice provisions of section 11-46-11 strictly in favor of the sovereign.[42] Ultimately, in 1997 in the

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1982) (holding that claimant must present notice of claim to proper statutory designated official or risk dismissal); Robinson v. Commonwealth, 584 N.E.2d 636, 637-38 (Mass. App. Ct. 1992) (holding that notice of claim given to anyone other than statutory designated official is insufficient compliance with Tort Claims Act). Even states that only require substantial compliance with their notice of claim provisions have found service of claim to the wrong official insufficient. *See* Willis v. City of Lincoln, 441 N.W.2d 846, 850 (Neb. 1989) (holding that notice of claim served to non-statutory designated official did not constitute substantial compliance with Act); Riddle v. Cain, 635 P.2d 394, 395-96 (Or. Ct. App. 1981) (holding that service of notice of claim to wrong official was not substantial compliance).

[40] Fraiser, *A Review of Issues*, *supra* note 2, at 657-58. *See* Miller v. Brunghardt, 904 F. Supp. 1215, 1217-18 (D. Kan. 1995) (holding that notice of claim that was missing monetary damages element failed to substantially comply with Kansas' statutory notice requirements); Haberstam v. Commonwealth, 467 S.E.2d 783, 785 (Va. 1996) (holding that notice of claim that did not contain required information failed to comply with Tort Claims Act). *See also* Dilts v. Cantua Elem. Sch. Dist., 234 Cal. Rptr. 612, 618 (Cal. Ct. App. 1987) (holding that substantial compliance still requires that notice of claim contain statutory required information).

[41] Fraiser, *A Review of Issues*, *supra* note 2, at 660-66. *See* Campbell v. District of Columbia, 568 A.2d 1076, 1077 (D.C. 1990) (holding that wrongful death complaint failed to satisfy notice of claim requirement); Pickett v. Commonwealth, 604 N.E.2d 43, 43-44 (Mass. App. Ct. 1992) (holding that actual complaint does not constitute presentment of notice of claim). *See also* Besette v. Enderlin Sch. Dist., 288 N.W.2d 67, 71 (N.D. 1980) (holding that actual notice of accident by political subdivision does not satisfy notice of claim requirement); Duran v. Board of County Comm'rs, 787 P.2d 971, 973 (Wyo. 1990) (holding that actual notice is not compliance with notice of claim requirement).

[42] Fraiser, *supra* note 11, at 710. *See* Moore v. Carroll County, 960 F. Supp. 1084, 1087-88 (N.D. Miss. 1997) (stating that though Mississippi has yet to decide between strict and substantial compliance, plaintiff's notice of claim would pass strict compliance standard); Simpson v. City of Pickens, 887 F. Supp. 126, 130 (S.D. Miss. 1995) (holding that Mississippi's statutory notice of claim is "jurisdic-

case of *City of Jackson v. Lumpkin*,[43] the Mississippi Supreme Court went on record declaring that Mississippi would require strict compliance with the notice of claim provisions of section 11-46-11.[44] The court cited legislative intent as the primary basis for interpreting section 11-46-11 strictly.[45] Justice McRae dissented, arguing that modern-day statutes should be interpreted under a "substantial compliance standard."[46]

The Mississippi Supreme Court elaborated and strengthened this landmark holding in *Carpenter v. Dawson*.[47] In *Carpenter*, the court reiterated its strict compliance stance, reasoning that the legislature's use of the word "shall" in sec-

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tional prerequisite" and dismissal of suit is proper when not given). *See also* Clifton v. Landry, No. 2:95-CV-266-PS, 1996 WL 755730, at *2 (S.D. Miss. Jan. 31, 1996) (holding that insufficient notice of claim warrants dismissal regardless of strict or substantial compliance).

[43] 697 So. 2d 1179 (Miss. 1997).

[44] *Lumpkin*, 697 So. 2d at 1181-82. In *Lumpkin*, the plaintiff notified the city's claims department of an accident in which he was injured and produced invoices of medical bills but never filed a notice of claim to the city's chief executive officer as required by section 11-46-11(1) of the Mississippi Code. *Id.* at 1181. *See also* MISS. CODE ANN. § 11-46-11(1) (1997). The court held that this type of notice was not in compliance with section 11-46-11(1) and dismissed the plaintiff's claim. *Lumpkin*, 697 So. 2d at 1182.

[45] *Id.* at 1181-82. The court found support for its holding of strict compliance in the legislature's use of "mandatory condition precedent language" in section 11-46-11. *Id.* at 1182, n.1. *See also* Fraiser, *A Review of Issues*, *supra* note 2, at 650.

[46] *Lumpkin*, 697 So. 2d at 1182 (McRae, J., dissenting). Justice McRae cited several cases that supported his proposition. *See* Bell v. Mitchell, 592 So. 2d 528, 532 (Miss. 1991) (holding that strict compliance with statute governing probate of claims against estates was no longer required); Central Optical Merchandising Co., Inc. v. Estate of Lowe, 160 So. 2d 673, 677 (Miss. 1964) (holding that rule that statutes in Mississippi should be strictly complied with is no longer applicable in modern-day Mississippi). *See also* Evans v. Boyle Flying Serv., Inc., 680 So. 2d 821, 829-30 (Miss. 1996) (holding that 60-day statutory notice of claim requirement to agricultural landowner before bringing suit only required substantial compliance); Brown v. Riley, 580 So. 2d 1234, 1237 (Miss. 1991) (holding that landowners must substantially comply with receipt of statutorily required summons).

[47] 701 So. 2d 806 (Miss. 1997). In *Carpenter*, the court held that the plaintiff's two-sentence letter to the city of Southaven's insurance company instead of the city's chief executive officer, which contained only the names of the parties and the date of the accident, failed to comply strictly with the notice provisions of section 11-46-11. *Carpenter*, 701 So. 2d at 807-08.

tion 11-46-11 evidenced its intent that the statute necessitated strict compliance.[48] The court acknowledged that strict compliance with the notice provisions of section 11-46-11 could act as a "pitfall" for unmindful litigators but maintained that such a consequence was necessary to effectuate the legislature's intent.[49] The court concluded that "passage of time" and "legal education" would alleviate the harshness of the strict interpretation of section 11-46-11.[50] After *Lumpkin* and *Carpenter*, Mississippi's state and federal courts began to construe the notice of claim provisions of section 11-46-11 strictly in a variety of different situations.[51]

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[48] *Id.* at 808. *See* Lowery v. Lowery, 657 So. 2d 817, 819-20 (Miss. 1995) (holding that use of word "shall" constitutes "mandatory directive"); Ivy v. Harrington, 644 So. 2d 1218, 1221 (Miss. 1994) (holding same). *See also* Fraiser, *A Review of Issues*, *supra* note 2, at 656. The court held that it "must enforce the statute as written." *Carpenter*, 701 So. 2d at 808.

[49] *Carpenter*, 701 So. 2d at 808. The court conceded that strict enforcement of section 11-46-11 could lead to "harsh results." *Id.*

[50] *Id.*

[51] Holmes v. Defer, 722 So. 2d 624, 628 (Miss. 1998). In *Holmes*, the court held that the plaintiff's failure to send the county any notice of claim at all before he filed suit warranted dismissal under the strict compliance standards of section 11-46-11. *Holmes*, 722 So. 2d at 628. The court further held that the county's actual or constructive notice of the plaintiff's claim was insufficient under section 11-46-11. *Id.* *See* Vortice v. Fordice, 711 So. 2d 894, 896 (Miss. 1998) (holding that notice of claims provision of section 11-46-11 was constitutional under rational relation test); Watts v. Lafayette County Sch. Dist., 737 So. 2d 1019, 1021-22 (Miss. Ct. App. 1998) (holding that student's letter to county's insurance carrier did not constitute strict compliance with notice provision of section 11-46-11); Soileau v. Mississippi Coast Coliseum Comm'n, 730 So. 2d 101, 104 (Miss. Ct. App. 1998) (holding that incident report filled out by government entity after claimant's accident is not sufficient notice of claim). *See also* Brown v. City of Greenwood, No. CA 4:97CV87-D-B, 1998 WL 433927, at *11 (N.D. Miss. June 29, 1998) (holding that under Mississippi's strict interpretation of section 11-46-11(2), service of notice of claim by regular mail instead of registered or certified mail as required was insufficient); Owen v. Williamson, No. CA-1 1:96CV259, 1998 WL 378350, at *7-8 (N.D. Miss. May 4, 1998) (dismissing claim pursuant to Mississippi's strict compliance standard when notice of claim is not given to chief executive officer as required by section 11-46-11(1)).

III. MISSISSIPPI'S SHIFT TO SUBSTANTIAL COMPLIANCE

From the before mentioned cases, it appeared that the philosophy of strict compliance with the statutory notice requirements was fully entrenched in Mississippi.[52] Accordingly, during this time period, many claims against government entities, whether meritous or not, were dismissed for failing to strictly follow section 11-46-11. It goes without saying that this provision was of great benefit to counsel for government entities throughout the state. However, a series of cases decided by the Mississippi Supreme Court in late 1998 and 1999 changed this philosophy dramatically. The impact of these cases is nothing short of astounding. After these cases and their progeny, what notice actually constitutes sufficient compliance with section 11-46-11 is now an open question.

A. Reaves v. Randall

Mississippi's abrupt shift to substantial compliance with its statutory notice provisions started with the case of *Reaves v. Randall*, which was decided in late December 1998.[53]

In *Reaves*, an injured plaintiff, who sent notice of claim to the superintendent of the local school district instead of to the chief executive officer of the government entity as required by section 11-46-11(1), appealed the dismissal of her claim for failure to comply with the statute.[54] The Mississippi Supreme Court agreed that the plaintiff did not strictly comply with section 11-46-11(1), but held that section 11-46-11(1)'s classification of "chief executive officer" was ambiguous.[55] The court then proceeded to expand the term "chief executive officer" under section 11-46-11(1) to include: "the president of the board, chairman of the board, any board member, or such other person employed in an executive capacity by a board or commission who can be reasonably expected to notify the government entity of its potential liability."[56] The court next struck a significant blow into strict compliance by holding that only substantial compliance with the provisions of section 11-46-11(1) is required[57] and that the plaintiff's notice to the superintendent complied with the statute.[58] The Mississippi Legislature subsequently revised section 11-46-11(1) to include some, but not all, of the expansion outlined in *Reaves*.[59] The court's flexible interpretation of section 11-46-11(1) in *Reaves* represented a significant departure from its prior interpretation in *Lumpkin* and *Carpenter* and that of other strict and substantial compliance states.[60]

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[52] *See Carpenter*, 701 So. 2d at 808; City of Jackson v. Lumpkin, 697 So. 2d 1179, 1181-82 (Miss. 1997).

[53] 729 So. 2d 1237 (Miss. 1998).

[54] *Reaves*, 729 So. 2d at 1238. The plaintiff countered that the Greenwood Municipal School District's insurance carrier actually responded to the plaintiff's notice of claim, and the school district participated in discovery earlier in the suit. *Id.* at 1238-39.

[55] *Id*, at 1240. The court stated that section 11-46-11(1) should be interpreted "reasonably," and that the uncertainty surrounding the term chief executive officer has caused "much hardship." *Id.*

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[56] *Id.* The court held that this expansion would insure a reasonable reading of section 11-46-11(1). *Id. But see* Brock v. Nyland, 955 P.2d 1037, 1040-41 (Colo. 1998) (holding that notice of claim filed with any official other than who legislature intended by statute failed substantial compliance). *See also Lumpkin*, 697 So. 2d at 1182 (holding legislature's use of mandatory language evidenced its intent for strict compliance with section 11-46-11(1)).

[57] *Reaves*, 729 So. 2d at 1240. In Chief Justice Prather's dissent, she argued that the court's holding in *Reaves* reversed Mississippi's strict compliance standard established in *Lumpkin* and *Carpenter* for "a very liberal substantial compliance scheme." *Id.* at 1241 (Prather, C.J., dissenting). Chief Justice Prather further argued that states with statutory notice of claim language similar to that of Mississippi's section 11-46-11(1) had interpreted their statutory notice provisions strictly. *Id.* at 1242 (Prather, C.J., dissenting). Chief Justice Prather also argued that the federal courts have traditionally interpreted the Federal Tort Claims Act strictly as well. *Id.* at 1242 n.3 (Prather, C.J., dissenting).

[58] *Id.* at 1240. The court concluded that since the superintendent that was presented with the notice of claim was "employed in an executive capacity" the school district had sufficient notice under section 11-46-11(1). *Id.*

[59] MISS. CODE ANN. § 11-46-11(1) (1999).

[60] *See* Owen v. Williamson, No. CA-1:96CV259, 1998 WL 378350, at *7-*8 (N.D. Miss. May 4, 1998) (holding that notice of claim given to any officer other than chief executive officer fails section 11-46-11(1)); *Lumpkin*, 697 So. 2d at 1181-82 (holding that notice of claim sent to municipal claims department instead of chief executive officer was insufficient compliance). *See also* Life v. County of Los Angeles, 278 Cal. Rptr. 196, 200 (Cal. Ct. App. 1991) (holding that service of notice of claim with county hospital's legal department instead of hospital official employed in executive capacity failed substantial compliance because there was no evidence these officials actually received notice); Weaver v. Commonwealth, 438

B. Carr v. Town of Shubuta

If there was any doubt that Mississippi had shifted to a substantial compliance state after *Reaves*, those questions were put to rest by the Mississippi Supreme Court's decision in *Carr v. Town of Shubuta*[61] decided in February 1999. In *Carr*, the court granted certiorari to an injured plaintiff's claim against the town of Shubuta that was dismissed because the plaintiff failed to serve notice of claim to the proper official under section 11-46-11(1)[62] and failed to include all the information that was required in the notice by section 11-46-11(2).[63] The court initially solidified its position that in light of *Reaves v. Randall*, Mississippi officially became a substantial compliance state in regard to its construction of section 11-46-11,[64] which officially overruled *Lumpkin*, *Carpenter*, and *Dawson*. The court in this instance did cite case law precedent from other jurisdictions, Indiana in particular, to support its reasoning for requiring only substantial compliance with the statutory notice requirements of section 11-46-11.[65] The court adopted the Indiana Supreme Court's position

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N.E.2d 831, 834-35 (Mass. 1982) (holding that notice sent to Commissioner of Department of Mental Health instead of Secretary of Executive Office of Human Services was not in strict compliance with notice statute).

[61] 733 So. 2d 261 (Miss. 1999). *See also* Fraiser, *supra* note 11, at 714.

[62] *Carr*, 733 So. 2d at 262-63. Specifically, the plaintiff Carr filled out an "incident report" provided by the city and gave it to the city clerk in reliance that the proper officials would receive notice of her claim. *Id.* at 262. However, Carr did not present her notice of claim to the mayor as is required by section 11-46-11(1), and her claim was subsequently dismissed for this defect. *Id.* at 262-63.

[63] *Id.* In the "incident report" that Carr filled out, she did not include "the amount of damages sought" as is mandated by section 11-46-11(2). *Id.* However, her incident report did include all the other information about the accident required by the statute, and the incident report did not have space provided for the "amount of damages sought." *Id.*

[64] *Id.* at 263. The court clarified any confusion about *Reaves v. Randall* by stating that in light of that decision, Mississippi courts would view the notice provisions of the Mississippi Tort Claims Act under a substantial compliance school of thought. *Id.* The court also unequivocally overruled its prior decisions in *Lumpkin*, *Carpenter*, and *Holmes* since these cases mandated strict compliance with section 11-46-11. *Id.*

[65] *Id.* at 263-65. The court adopted the rationale of these other states that

that what actually constitutes substantial compliance with the notice of claim provisions is a "fact sensitive determination" that must be "decided on an ad hoc basis" by the trial court.[66] The court held the town was estopped from asserting the plaintiff did not serve notice to the mayor under section 11-46-11(1) since she completed her notice of claim on forms provided by the town in reliance that the mayor would be notified.[67]

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substantial compliance could still achieve the underlying purpose of the Tort Claims Act notice provisions, which was: to give the governing body an opportunity to investigate the claim, put the governing body on notice of any hazardous conditions so that corrective measures can be taken, and to encourage settlement. *Id.* at 263. The court cited extensively to the Indiana Supreme Court decision of *Collier v. Prater*. *Id.* In *Collier*, the Indiana Supreme Court stated that the notice of claim requirements should not serve as a "trap for the unwary" when the statute has been substantially complied with. Collier v. Prater, 544 N.E.2d 497, 498 (Ind. 1989). Accordingly, although the plaintiff in *Collier* did not include the location or time that the accident took place, his notice of claim was still held to be in substantial compliance with the notice statute. *Collier*, 544 N.E.2d at 500. *See also* Blohm v. Emmet County Bd. of County Rd. Comm'rs, 565 N.W.2d 924, 926 (Mich. Ct. App. 1997) (holding that government entity barred from asserting claimant's noncompliance with notice of claim statute because actual prejudice shown); Fritisch v. St. Croix Cent. Sch. Dist., 515 N.W.2d 328, 331 (Wis. Ct. App. 1994) (holding that Wisconsin is substantial compliance state and entity was estopped from asserting noncompliance due to claimant's reliance based on insurance carrier's actions); Figgs v. City of Milwaukee, 357 N.W.2d 548, 554 (Wis. 1984) (holding that only substantial compliance with notice of claim provisions required).

[66] *Carr*, 733 So. 2d at 263-65. In *Collier*, the court specifically held that "what constitutes substantial compliance, while not a question of fact but one of law, is a fact sensitive determination." *Collier*, 544 N.E.2d at 499. The court in *Collier* further stated that under a substantial compliance system "what information is sufficient will vary depending on the facts of each case." *Id.* The Mississippi Supreme Court in *Carr* bought into the reasoning propounded in Indiana by *Collier* wholeheartedly. *Carr*, 733 So. 2d at 263-65. *But see* Fraiser, *supra* note 11, at 715-16 (holding that court in *Carr* based its decision on case law from Indiana's Tort Claims Act that was substantially different from Mississippi's notice of claim act).

[67] *Carr*, 733 So. 2d at 264-65. The court also noted that settlement negotiations with the city's insurer were ongoing. *Id. See Fritisch*, 515 N.W.2d at 331 (holding that defendant was estopped from asserting noncompliance due to plaintiff's reliance on insurance carrier's actions). However, this ruling on estoppel is counter to many other substantial compliance jurisdictions. *See* J. James Fraiser, *A Review of Issues*, *supra* note 2, at 690-91 (stating that majority of substantial compliance jurisdictions do not allow waiver or estoppel to defeat government entity's defenses under notice of claim statute). *See also* Willis v. City of

The court also held that the plaintiff's failure to include the amount of damages in her notice of claim as is required by section 11-46-11(2) was not detrimental to her claim under a substantial compliance standard.[68] The court then concluded that its decision to move to substantial compliance had no effect on its prior holdings in *Lumpkin*, *Carpenter*, and *Holmes* because the notice of claims in these cases would have failed substantial compliance standards as well.[69] Interestingly, however, the court was quick to point out that substantial compliance was not the equivalent of non-compliance, and the determination of whether a notice of claim meets substantial compliance depends on the facts of each case.[70]

C. The Aftermath and the Expansion of Substantial Compliance

After *Reaves* and *Carr*, the uncertainty surrounding what actually constituted substantial compliance with the notice of claim provisions of section 11-46-11 would plague the subsequent Mississippi Supreme Court and Court of Appeals deci-

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Lincoln, 441 N.W.2d 846, 850 (holding that waiver and estoppel should only apply to defeat municipality's statutory notice defenses in extreme circumstances where justice demands).

[68] *Carr*, 733 So. 2d at 265-66. *But see* Carpenter v. Dawson,, 701 So. 2d 806, 807 (Miss. 1997) (holding that two sentence letter that only stated names of parties involved and time of incident did not contain information statutorily required by section 11-46-11(2)). Interestingly, in the case of *Miller v. Brungardt*, the Federal District Court of Kansas, in interpreting Kansas tort claims law, reached a contrary result to the one in *Carr*. Miller v. Brungardt, 904 F. Supp. 1215, 1217-18 (D. Kan. 1995). In *Miller*, the district court held that the claimant's failure to include the amount of monetary damages sought warranted dismissal of her claim though Kansas was a substantial compliance state with regard to the notice of claim provisions of its Tort Claims Act. *Miller*, 904 F. Supp. at 1217-18. It is also interesting to note that Kansas' Tort Claims Act is very similar to Mississippi's in regard to the information required in its notice of claim provisions. Fraiser, *A Review of the Issues*, *supra* note 2, at 658.

[69] *Carr*, 733 So. 2d at 266. However, the court reiterated that these cases were still overruled in regard to their strict compliance stance. *Id.*

[70] *Id.* at 265. The court stated that "substantial compliance is not the same as, nor a substitute for, noncompliance." *Id.* Interestingly, all of the justices concurred in the result reached in *Carr*. *Id.* at 266.

sions decided in 1999.[71] The uncertainty left in the wake of *Reaves* and *Carr* has led to both interesting and inconsistent results from the courts and has stretched compliance with section 11-46-11 to unimaginable levels far beyond what the Mississippi Legislature originally intended or still intends.

The Mississippi Supreme Court dropped a major bombshell on section 11-46-11 on May 13, 1999, when it decided *Thornburg v. Magnolia Regional Health Center*[72] and *City of Pascagoula v. Tomlinson.*[73] In *Thornburg*, the court first held that a medical center administrator could be considered a "chief executive officer" under section 11-46-11(1) because he was an official "employed in an executive capacity."[74] The court then declared that the claimant's failure to include her residence, both at the time of injury and at the time of the filing of the notice as required by section 11-46-11(2)'s content requirement, was not fatal to her claim.[75] The court also held that a notice of claim sent by first class mail instead of by delivery, by registered, or certified mail as mandated by section 11-46-(2) was still in substantial compliance with the statute.[76] Finally, the court allowed the inclusion of a settlement offer that would expire in twenty days in a notice of claim despite the ninety-day waiting period mandated by section 11-46-11(1).[77] In *Tomlinson*, the court held that a claimant's failure to comply with the ninety-day waiting period under section 11-46-11(1) before filing suit did not warrant dismissal of the claim.[78] The court declared that the only remedy available to a governing entity in such a situation was to request a stay in the proceedings in order to investigate the claim.[79] The court further held that substantial compliance with each element of the notice of claim under section 11-46-11 was not required.[80]

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[71] *See* Fraiser, *supra* note 11, at 715-16.

[72] 741 So. 2d 220 (Miss. 1999).

[73] 741 So. 2d 224 (Miss. 1999).

[74] *Thornburg*, 741 So. 2d at 222. The court relied on the definition of "chief executive officer" first expounded in *Reaves v. Randall. Id.*

[75] *Id.* at 223. Interestingly, the court stated that the health center could have easily have found the claimant's address on its own. *Id.* In effect, the court imputed a duty upon the government entity to find whatever information is missing from a notice of claim it receives from claimants that are suing the entity. *Id. But see* Fraiser, *supra* note 11, at 712-13. This burden shifting is contrary to the majority view in both strict and substantial compliance jurisdictions. *Id.* Failure to include the claimant's residence in the notice of claim has been found to be sufficient compliance in a recent supreme court case as well. *See* Powell v. City of Pascagoula, No. 98-CA-00643-SCT, 1999 WL 1202038, at *4-5 (Miss. Dec. 16, 1999).

[76] *Thornburg*, 741 So. 2d at 223. The court held that when notice is sent to the government entity by regular mail instead of through registered or certified mail, dismissal of the claim is not warranted if that government entity received notice of the claim and incurred no actual prejudice from the delivery of the notice through regular mail. *Id.* The court also stated that the provision in section 11-46-11(2) regarding the requirements for the delivery of notice of claim is

The court went even further in the case of *Jackson v. City of Booneville*,[81] which held that a notice of claim sent seven months after the complaint was filed constituted substantial compliance.[82] In *Ferrer v. Jackson County Board of Supervisors*,[83] the court even found substantial compliance with sec-

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not jurisdictional. *Id. But see* United States v. Beggerly, 524 U.S. 38, 47 (1998) (holding that similar provision in Federal Tort Claims Act was "jurisdictional prerequisite").

[77] *Thornburg*, 741 So. 2d at 223.

[78] *Tomlinson*, 741 So. 2d at 228. The court held that dismissal of a claim for failure to obey the 90-day waiting period was a "disproportionate remedy" that would conflict with the intent of the Tort Claims Act. *Id.*

[79] *Id.* The court held that a government entity would be allowed to recoup any legal fees expended in requesting the stay from the claimant that violated the waiting period. *Id.* However, the court also held that failure to request a stay in the proceedings would waive the right to such fees. *Id.* Interestingly, nowhere in section 11-46-11(1) is a stay, rather than dismissal, provided as the statutory remedy for a violation of the 90-day waiting period. *See* MISS. CODE ANN. § 11-46-11(1) (1999).

[80] *Tomlinson*, 744 So. 2d at 226. *But see* Fraiser, *A Review of the Issues*, *supra* note 2, at 677 (stating that several substantial compliance states still require substantial compliance with each element in notice of claim).

[81] 738 So. 2d 1241 (Miss. 1999).

[82] *Jackson*, 738 So. 2d at 1245-46. The complaint was filed on April 2, 1997, yet notice was not presented to the mayor until November 12, 1997, in reverse chronological order of what section 11-46-11(1) requires. *Id.* The court reiterated, as it held in *Tomlinson*, that the only remedy available to the municipality was to request a stay in the proceedings to investigate the claim. *Id.* at 1246. *But see* Eure v. United States Postal Serv., 711 F. Supp. 1365, 1369 (S.D. Miss. 1989) (dismissing claim under Federal Tort Claims Act when notice of claim served after suit was filed).

[83] 741 So. 2d 216 (Miss. 1999).

tion 11-46-11(1) when no notice of claim was sent at all based on extensive settlement negotiations between the two parties' lawyers before the complaint was filed.[84] Further still, in *Smith County School District v. McNeil*,[85] the court even hinted that three letters sent to a governmental entity's insurance carrier may constitute substantial compliance with the notice provisions of section 11-46-11(1).[86] The court has also recently found substantial compliance with section 11-46-11(1) when the notice of claim was sent to an Administrator of UMC,[87] the manager of Public Housing of an entity,[88] and the Chairman of the Mississippi Gaming Commission,[89] instead of the "chief executive officers" of these government entities under section 11-46-11(1). Needless to say, these extensions of substantial compliance are in direct conflict with the plain language of sections 11-46-11(1) and 11-46-11(2) and come dangerously close to contradicting the court's earlier pronouncement in *Carr* that substantial compliance was not the same as non-compliance.[90]

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[84] *Ferrer*, 741 So. 2d at 219. The court reasoned that these "prolonged, continuous, and extensive" communications between the claimant and the county imputed actual notice to the county's board of supervisors. *Id. But see* Besette v. Enderlin Sch. Dist., 288 N.W.2d 67, 71 (N.D. 1980) (holding that actual notice of accident by government entity is not substitute for notice of claim).

[85] 743 So. 2d 376 (Miss. 1999).

[86] *McNeil*, 743 So. 2d at 378-79. In dicta, the court stated that if the school district's insurance carrier had knowledge of the claim, then the school district should also have sufficient notice of the claim under section 11-46-11(1). *Id.* This language implies that the court will not require any notice to be sent to a government entity if the entity has actual notice of the claim. Martha Bost Stegall, *Evolution of "Notice" Under the Mississippi Tort Claims Act*, MISS. LAWYER, Oct. 1999, at 20. However, in *Carr*, the court specifically stated that the letter sent to the municipal insurance carrier in *Carpenter v. Dawson* would not even constitute substantial compliance with section 11-46-11(2). Carr v. Town of Shubuta, 733 So. 2d 261, 266 (Miss. 1999).

[87] McNair v. University of Mississippi Med. Ctr., 742 So. 2d 1078, 1081 (Miss. 1999). *See also* Humphrey v. Ocean Springs Hosp., No. 1998-CA-01521-SCT, 1999 WL 1042932 (Miss. Nov. 18, 1999), at *3 (holding that notice of claim served upon administrator of subsidiary hospital constitutes notice upon parent hospital under notice statute because subsidiary official can be "reasonably expected to notify parent organization of its potential liability").

[88] Tennessee Valley Reg'l Hous. Auth. v. Bailey, 740 So. 2d 869, 872-73 (Miss. 1999).

[89] Alexander v. Mississippi Gaming Comm'n, 735 So. 2d 360, 363 (Miss. 1999).

IV. THE PRESENT STATE OF SUBSTANTIAL COMPLIANCE IN MISSISSIPPI

A. *Problems and Implications of the Shift to Substantial Compliance*

The Mississippi Supreme Court clearly moved Mississippi to a substantial compliance state with its decisions in *Reaves v. Randall* and *Carr v. Town of Shubuta.*[91] The court's move in this direction was well intentioned and noble, for it allows many legitimate claims by injured plaintiffs against the government entities of Mississippi to go forward where they were once dismissed under the so-called "trap" of sections 11-46-11(1) and 11-46-11(2). However, though well intentioned, the court's shift to a new substantial compliance system has left unexpected and unintended consequences in its wake. Based on these specific problems and consequences that are outlined below the court should consider rethinking its substantial compliance stance.

For starters, the court's decision in *Reaves* and subsequent cases have created a situation where almost everybody employed by a government entity could be considered "employed in an executive capacity," "who can reasonably be expected to notify the government entity of its potential liability," and thus be served with a notice of claim under section 11-46-11(1).[92] Accordingly, plaintiff's counsel can legitimately argue that any employee served with a notice of claim, regardless of position, could reasonably be expected to inform their government entity of liability.

Furthermore, the ruling in *Reaves* and the subsequent cases stating that it is proper for any official "employed in an executive capacity" to receive a notice of claim is still at odds with section 11-46-11(1).[93] As previously mentioned, section 11-46-11(1) was amended by the Mississippi Legislature on March 15, 1999 in response to the *Reaves* and *Carr* decisions.[94] That amendment expanded the officials allowed to receive notice of claim under section 11-46-11(1) to include the county chancery clerk if the entity sued is a county, the city clerk if the entity sued is a municipality, and the chief executive officer if the government entity sued is a state entity or any other recognized government entity of the state.[95] Nowhere in this recently updated statute did the legislature include an official "employed in an executive capacity" as an appropriate official to receive a notice of claim. The statute, as recently amended by the legislature in light of *Reaves* and *Carr*, should be controlling over *Reaves* and progeny because it reflects the legislature's actual intent with regard to section 11-46-11(1). Accordingly, the cases of *Reaves*, *Thornburg*, *McNair v. University of Mississippi Medical Center*, and *Tennessee Regional Housing Authority v. Bailey* are in contravention of section 11-46-11(1) and should be disregarded to the extent that they hold it is acceptable for any official "employed in an executive capacity" to be served notice of claim.[96] However, in light of the current expansionist trend with regard to section 11-46-11(1), service of claim to almost anybody employed by a government entity will probably suffice.

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[90] *See supra* note 70 and accompanying text.

[91] *See supra* notes 11, 55-57, 64-66, 70, and accompanying text.

[92] *See supra* notes 55-56, 58, 74, 87-89, and accompanying text. This is precisely why many jurisdictions, both strict and substantial compliance alike, limit what government official is authorized to receive a notice of claim. *See supra* note 39.

Besides running directly counter to section 11-46-11(1), the recent 1999 cases have turned the rest of section 11-46-11 on its ear and have made most of the jurisdictional prerequisites of sections 11-46-11(1) and 11-46-11(2) little more than formalities that can be ignored by claimants suing governmental entities. For example, section 11-46-11(1)'s requirement that a claimant must wait ninety days after presenting a notice of claim before bringing suit against a government entity was essentially disregarded in *Tomlinson* and *Jackson*.[97] The cases of *Ferrer* and *McNeil* raise the question of whether a section 11-46-11(1) notice of claim must be filed at all if the government entity or its insurance carrier have actual or constructive notice of the claim.[98] From these cases, it is becoming increasingly evident that actual or constructive notice is enough under section 11-46-11(1). In *Thornburg*, the court ostensibly threw out the requirement in section 11-46-11(2) that notice of claim must be delivered "by registered or certified United States mail."[99] *Thornburg* also found inconsequential the fact that a notice of claim did not include the claimant's residence both at the time of injury and at the time of filing as is also required by section 11-46-11(2).[100] And finally, *Carr* held that a notice of claim that did not include the "amount of money damages sought" was still in compliance with the statute though section 11-46-11(2) requires that it must be included.[101] On an additional note, the recent court rulings regarding compliance with its notice of claim provisions run counter to similar notice of claim rulings of the Federal Tort Claims Act[102] and that of both strict and substantial states.[103]

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[93] Fraiser, *supra* note 11, at 717-18.

[94] *See supra* note 11 and accompanying text.

[95] MISS. CODE ANN. § 11-46-11(1) (1999).

[96] Fraiser, *supra* note 11, at 717-18.

These notice of claim defects may seem trivial to some. However, this weakening of section 11-46-11 is troubling because the legislature enacted these jurisdictional and content requirements of a notice of claim for a reason, and they at least should be followed by the courts no matter how harsh the result.[104] However, the way it stands today section 11-46-11's compliance standards are truly more akin to noncompliance rather than substantial compliance.[105]

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[97] *See supra* notes 78, 79, 81, 82, and accompanying text.

[98] *See supra* notes 83-86 and accompanying text. This contention runs afoul to rulings in other state and in the federal courts. *See supra* notes 35 and 41.

[99] *See supra* note 76 and accompanying text. *See also* McNair v. University of Mississippi Med. Ctr., 742 So. 2d 1078, 1081 (Miss. 1999) (holding that service by regular mail is sufficient under section 11-46-11(2)).

[100] *See supra* note 75 and accompanying text. *Thornburg* can also be interpreted as shifting to the government entity rather than the claimant the burden of finding section 11-46-11(2) information left out of the notice of claim. *Id.*

[101] *See supra* note 68 and accompanying text.

[102] *See supra* notes 32-36, 76, and accompanying text.

[103] *See supra* notes 37-41, 60, 67-68, 84, and accompanying text.

B. What Constitutes Substantial Compliance Now

Of all the problems associated with the supreme court's shift to substantial compliance, none has been more difficult for lawyers and judges than the uncertainty of what substantial compliance is now. It is a gray area to say the least. This determination is by no means helped by the court's pronouncement in *Carr* that what constitutes substantial compliance depends on the facts of each case and should be decided on an "ad hoc basis."[106] This "ad hoc" empowerment can lead to unpredictable and inconsistent results from the trial court that must decide most of the challenges to a notice of claim. Since section 11-46-11 now allows a more flexible interpretation trial court judges throughout the state will naturally vary in their determination of whether a particular notice of claim substantially complies with the statute. A strict, more qualified standard from the supreme court will help alleviate this problem. Accordingly, until the supreme court revisits the issue, the most effective way for judges and counsel to know what actually is substantial compliance is to turn to the supreme court's recent pronouncements on what is and is not in compliance under section 11-46-11. It is this very examination that this comment now explores.

1. In Substantial Compliance

We learned from *Reaves* and its progeny that presentment of a notice of claim to any government entity employee that can fairly be argued to be "employed in an executive capacity" or "who can be reasonably expected to notify the government entity of its liability" is in substantial compliance with section 11-46-11(1).[107] We know that a claimant is still in substantial compliance with section 11-46-11(1) even if he or she files suit before the statutory ninety-day waiting period expires and that all the government entity can do is request a stay.[108] We also know that there is still substantial compliance under section 11-46-11(1) even when the notice of claim is presented after the suit is filed.[109] Substantial compliance with section 11-46-11(1) can even be argued when no notice of claim is sent at all provided the claimant can prove that the government entity or its insurance carrier had actual or constructive notice of the claim.[110]

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[104] *See supra* notes 26, 27, 49-50, and accompanying text.
[105] *See supra* notes 70, 90, and accompanying text.
[106] *See supra* notes 66, 70, and accompanying text.

As for the content of the notice, we know that a notice of claim is still in substantial compliance with section 11-46-11(2) though it is sent to the governing entity by regular mail rather than by registered or certified mail.[111] Substantial compliance with section 11-46-11(2) is also obtained if the notice of claim fails to include the amount of money damages sought or the residence of the claimant.[112]

2. *Not in Substantial Compliance*

Based on *Carr*'s pronouncement we know that the actual rulings in *Lumpkin*, *Carpenter*, and *Holmes* are still valid.[113] Therefore, we still know that notice of claim through medical bills and invoices, a two-sentence letter to a governmental entity's insurance carrier, and no notice of claim at all are not substantial compliance with section 11-46-11.[114] The court has also held in several recent cases that a claimant's failure to file suit within the one-year statute of limitations set out in section 11-46-11(3) was not in substantial compliance with the statute.[115] Accordingly, counsel should be aware that it appears that the current court is still inclined to interpret section 11-46-11(3)'s one-year statute of limitations strictly even in light of the court's shift to a more relaxed compliance standard for section 11-46-11's other provisions.

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[107] *See supra* notes 56, 74, 87-89, 92, and accompanying text.

[108] *See supra* notes 78-79, 98, and accompanying text.

[109] *See supra* notes 81-82, 98, and accompanying text.

[110] *See supra* notes 83-86, 99, and accompanying text.

[111] *See supra* notes 76, 100, and accompanying text.

[112] *See supra* notes 68, 75, 100-101, and accompanying text.

[113] *See supra* note 69 and accompanying text.

[114] *See supra* notes 44, 47, 51, and accompanying text. However, notice of claim might not be required if the entity or its insurance carrier have actual or constructive notice of the claim. Ferrer v. Jackson County Bd. of Supervisors, 741 So. 2d 216, 219 (Miss. 1999).

D. Section 11-46-11 as a Jurisdictional Prerequisite?

An important issue left substantially unresolved by the *Reeves v. Randall*, *Carr v. Town of Shubuta* line of cases is whether the notice of claim requirements of section 11-46-11 of the Mississippi Code are still jurisdictional prerequisites to filing suit under the Mississippi Tort Claims Act. In *City of Jackson v. Lumpkin*, the court unequivocally declared that the notice of claim requirements were jurisdictional in nature.[116] Although the court in both *Reeves v. Randall* and *Carr v. Town of Shubuta* held that only substantial compliance with the notice of claim requirements of section 11-46-11 was necessary, it did not address whether the statutory requirements were still jurisdictional.[117] However, later that year the court did address the question of whether section 11-46-11(1) and (2) were jurisdictional prerequisites although it reached conflicting interpretations. In *Thornburg v. Magnolia Regional Health Center*, the court held that the statutory notice of claim requirements of section 11-46-11 were not jurisdictional.[118]

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[115] *See* City of Tupelo v. Martin, No. 97-IA-01542-SCT, 1999 WL 688645, at *7 (Miss. Sept. 2, 1999); State v. Dampeer, 741 So. 2d 234, 238 (Miss. 1999); Marcum v. Hancock County Sch. Dist., 744 So. 2d 754, 756 (Miss. 1999); Mississippi Dep't of Pub. Safety v. Stringer, No. 97-IA-00187-SCT, 1999 WL 353025, at *6 (Miss. June 3, 1999). *See also* Hays v. Lafayette County Sch. Dist., No. 98-CA-01256-SCT, 1999 WL 1126574 (Miss. Dec. 9, 1999) (holding that one-year statute of limitation set out in section 11-46-11(3) is not tolled by "Minor's Savings Clause" of section 15-1-59).

[116] 697 So. 2d 1179, 1181 (Miss. 1997). The court found the argument that the statutory notice of claim requirements of section 11-46-11 was merely a "directive" rather than "jurisdictional" unconvincing. *Lumpkin*, 697 So. 2d at 1181.

[117] *See* Carr v. Town of Shubuta, 733 So. 2d 261, 263 (Miss. 1999); Reaves v. Randall, 729 So. 2d 1237, 1240 (Miss. 1998).

[118] 741 So. 2d 220, 229 (Miss. 1999). The court specifically held that "the stat-

However, less than one month later in *Mississippi Department of Public Safety v. Stringer*, the court contradicted its earlier statement and held that the notice of claim requirements were jurisdictional.[119] The court made reference to these inconsistencies in *Gale v. Thomas*, but did not conclusively resolve the controversy one way or the other.[120] Whether the current court will continue to interpret the notice of claim requirements of section 11-46-11 as jurisdictional or not in the future is still in doubt.[121] Accordingly, the court should affirmatively and conclusively settle this disputed question of law in the future.

CONCLUSION

From the cases decided by the court this past year, there is no doubt that Mississippi is now a substantial compliance state in enforcing its notice of claim statute section 11-46-11. This change will make it easier for citizens to bring suit against government entities throughout the state for tortious conduct. However, this relaxed standard is contrary to the

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utory notice required by the Tort Claims Act does not give rise to the same jurisdictional/due process concerns which arise" from other types of statutory requirements such as service of summons. *Thornburg*, 741 So. 2d at 224. The court went on to state that the statutory notice requirements of section 11-46-11 were not jurisdictional, but rather "merely a means of informing a government entity of the existence of a claim which might give rise to a lawsuit in the future." *Id.*

[119] No. 97-IA-00187-SCT, 1999 WL 353025, at *3 (Miss. June 3, 1999). The court held that it had "previously held that the timely filing of notice is a jurisdictional issue." *Stringer*, 1999 WL 353025, at *3. (citing City of Jackson v. Lumpkin, 697 So. 2d 1179, 1111 (Miss. 1997)).

[120] No. 1998-CA-01234-SCT, 1999 WL 1126562, at *10-11 (Miss. Dec. 9, 1999). The courts after revealing the conflicting interpretation of its prior opinions, went on to hold that noncompliance with the notice requirements of section 11-46-11 could not be raised for the first time on appeal no matter whether the statute was jurisdictional or not. *Gale*, 1999 WL 1126562, at *10-11.

[121] *See id. See also* Thornburg v. Magnolia Reg. Health Ctr., 741 So. 2d 220, 224 (Miss. 1999); Stringer v. Mississippi Dep't of Pub. Safety, No. 97-IA-00187-SCT, 1999 WL 353025, at *3 (Miss. June 3, 1999). However, in light of the court's recent shift to substantial compliance with section 11-4-11 in *Reeves v. Randall* and its continuing trend of enforcing the notice of claim requirements under a more flexible standard, there is a good chance that the court will consider the statutory notice as nonjurisdictional. *See supra* notes 97-105, and 118.

express intent of the Mississippi Legislature and has essentially taken the teeth out of a once effective statute. This shift has also created a substantial amount of uncertainty in the legal community as to what substantial compliance really is. These recent decisions have started section 11-46-11 down a slippery slope to where almost anything can be argued to be substantial compliance. Though section 11-46-11 was harsh during the strict compliance era, it was also consistent and certain. The court should seriously entertain the prospect of reconsidering its new position or perhaps consider setting limits on what can constitute substantial compliance.

Zach Scruggs

MISSISSIPPI'S 2002 CONGRESSIONAL REAPPORTIONMENT: LEGISLATORS BEWARE—ELIMINATING A MINORITY INFLUENCE DISTRICT MAY VIOLATE THE NONRETROGRESSION PRINCIPLE OF THE VOTING RIGHTS ACT

The United States Constitution requires that the federal government conduct a census of the country's population every ten years.[1] Among other things, Congress uses the census information to determine each state's congressional district allotment for the following ten years.[2] With that allocation, the Mississippi legislature will reapportion its existing congressional districts pursuant to the findings of the year 2000 census.[3] Currently, Mississippi has five congressional representatives.[4] However, many observers speculate that due to Mississippi's slow population growth the state will lose a congressional seat in its next apportionment.[5] Consequently, the

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[1] U.S. CONST. art. I, § 2, cl. 3.

[2] *Id.* The clause states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." *Id.*

[3] *Id.* The Constitution provides that state legislatures should use the census information to draw their states' legislative districts. *Id.* Furthermore, a state statute provides for a congressional redistricting committee consisting of members of the Mississippi House of Representatives, appointed by the speaker of the house, and members of the state Senate, appointed by the lieutenant governor. MISS. CODE ANN. § 5-3-121 (1972).

[4] MISS. CODE ANN. § 23-15-1037 (1972). Mississippi's current congressional delegation is the following: First Congressional District, Roger Wicker, a white Republican; Second Congressional District, Bennie Thompson, a black Democrat; Third Congressional District, Charles "Chip" Pickering, a white Republican; Fourth Congressional District, Ronnie Shows, a white Democrat; Fifth Congressional District, Gene Taylor, a white Democrat. *See infra* notes 115-69 and accompanying text. *See also* Appendix A, a map of Mississippi's current congressional districts.

[5] *Funds Sought to Educate Miss. on Importance of 2000 Census*, BATON ROUGE ADVOC., Sept. 18, 1998, at 9B, *available in* 1998 WL 4912618. Experts estimate Mississippi will fall approximately 20,000 people short of maintaining

Mississippi legislature will have to make difficult choices in reshaping its congressional districts. Guidance for those decisions will come primarily from the provisions in the Voting Rights Act of 1965, voting rights case law, and traditional districting principles.[6] Because the results of the next apportionment are critical to Mississippi's political and voting interests, and unresolved redistricting questions exist, this comment's purpose is to analyze voting rights law, one possible redistricting plan, the plan's potential outcome, and an alternative approach. Ultimately, this comment examines a novel issue in voting rights law: whether eliminating a minority influence district when a state loses a congressional seat violates the Voting Rights Act of 1965.

I. THE VOTING RIGHTS ACT OF 1965

A. *The Act's Development*

During the Reconstruction period after the Civil War, the United States ratified the Fifteenth Amendment of the Constitution.[7] The Amendment's purpose was to ensure equal voting power for newly enfranchised black American men.[8] Further-

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five congressional seats. *Id.*

In addition to Mississippi, authorities predict Connecticut, New York, Pennsylvania, Ohio, Illinois, Wisconsin, and Oklahoma will lose congressional seats. John Mercurio, *Census Politics Study Says Court Decision Hurts Texas, California*, ROLL CALL, Jan. 28, 1999, *available in* 1999 WL 14664717 at *2.

[6] *See* Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733-34 (1998) (outlining federal limitations on apportionment process). According to Professor Karlan, federal law prohibits seven basic actions in the apportionment process: (1) violations of the one person, one vote principle; (2) purposeful discrimination; (3) excessive political gerrymandering; (4) subordinating traditional race-neutral districting principles; (5) diluting minority voting strength; (6) reducing minority voting strength from previous levels; and (7) altering congressional districts so that they are multi-member districts. *Id.*

[7] U.S. CONST. amend. XV. The United States ratified the Fifteenth Amendment in 1870. *Id.*

[8] *Id.* The Amendment states, "The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* In 1920, the Twentieth Amendment to the Constitution extended the Fifteenth Amendment's protections to minority women. *See* U.S. CONST. amend XX (ensuring women the right to vote under Constitu-

1more, the Amendment provided Congress with authority to pass appropriate legislation for its enforcement.[9] However, despite this new constitutional protection, for nearly a century, many southern states applied "massive resistance" to black voting power.[10] Finally, in 1965, Congress passed the Voting Rights Act (VRA) as a measure to enforce the Fifteenth Amendment.[11] Section 2 of the Act provided that no state or political subdivision could impose any voting practice or procedure that would deny or abridge a person's right to vote on the basis of race or color.[12] Additionally, section 5 required any

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tion).

[9] *Id.* The Fifteenth Amendment continues, "The Congress shall have the power to enforce this article by appropriate legislation." *Id.* Soon after ratification, Congress enacted the Enforcement Act of 1870, which prohibited public officials and private citizens from obstructing the right to vote. South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966). However, over time, the "fervor for racial equality waned, enforcement of the laws became spotty and ineffective," and Congress repealed most of the Act's provisions. *Katzenbach*, 383 U.S. at 310.

[10] *See generally* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 34-77 (1990) (discussing actions Southern states took to resist minority enfranchisement). The Supreme Court has noted that beginning in 1890, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted literacy tests to prevent minority voting. *Katzenbach*, 383 U.S. at 310-11. In addition to placing a voting barrier for illiterate minorities, the southern states applied the tests unequally, so that illiterate whites could register to vote, while well educated blacks could not. *See, e.g.*, United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962) (noting that Forrest County, Mississippi Circuit Clerk Theron Lynd denied registration to five minority school teachers, six black applicants with college baccalaureate degrees, and three minority applicants with Master of Arts degrees).

[11] Voinovich v. Quilter, 507 U.S. 146, 152 (1993). In part, Congress enacted the VRA because of the infamous events in Selma, Alabama on March 7, 1965. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 265-66 (1998). On that "Bloody Sunday," national television captured Alabama public officials and their violent response to black Alabamians' peaceful protest of voting inequities. *Id.* Responding to national outrage, President Lyndon B. Johnson directed the Department of Justice to formulate a new apparatus to deal with discrimination, which produced the Act. *Id. See also* Ronald J. Krotoszynski, *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1412 n.4 (1995) (stating that historians generally acknowledge nexus between Selma and VRA's passage). The United States Supreme Court has echoed that interpretation. *See* Shaw v. Reno, 509 U.S. 630, 640 (1993) (stating VRA of 1965 was response to state practices inhibiting exercise of Fifteenth Amendment).

[12] Voting Rights Act of 1965 § 2, 42 U.S.C.A. § 1973(a) (West 1994). Original-

jurisdiction[13] with a history of voting discrimination to preclear its proposed voting system with the federal government prior to changing it.[14] Thus, section 2 provided a weapon to combat existing discriminatory voting practices within a jurisdiction, while section 5 assailed discriminatory changes in voting systems.[15]

In 1966, South Carolina leveled a critical challenge to the VRA in *South Carolina v. Katzenbach*.[16] The southern state attacked the VRA's constitutionality and its application to the states.[17] In holding the VRA constitutional, the Supreme Court took the opportunity to stress the VRA's purpose and

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ly, section 2 stated:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen.

Id. (prior to 1982 amendment).

[13] Voting Rights Act of 1965 § 5, 42 U.S.C.A. § 1973c (West 1994). Congress determined that section 5 covered jurisdictions with low levels of minority vote turnout, which previously used literacy tests. J. Morgan Kousser, *Beyond* Gingles: *Influenced Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 557 (1993). According to United States Department of Justice guidelines, section 5 covers Alabama, Arkansas, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. 28 C.F.R. Pt. 51, Appendix (1999). Section 5 also covers portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota *Id.*

[14] 42 U.S.C.A. § 1973c. Section 5 provides a state or political subdivision seeking to alter its voting practice with two methods of preclearance. *Id.* First, such a jurisdiction may seek a declaratory judgment in the United States District Court for the District of Columbia that the proposed change has neither a discriminatory intent nor effect. *Id.* Second, a jurisdiction may submit its proposed change to the United States Attorney General, who may object if she finds the change has discriminatory intent or effect. *Id.* If the Attorney General declines to object, then the state or political subdivision is pre-cleared. *Id.*

[15] *See Preclearance Requirements*, 111 HARV. L. REV. 421, 428 (1997) (likening section 2 to "sword," and section 5 to "shield" because of their differing functions).

[16] 383 U.S. 301 (1966).

[17] *Katzenbach*, 383 U.S. at 307. South Carolina sought a declaratory judgment that the VRA was unconstitutional. *Id.* The State claimed the Act violated the Constitution for a variety of reasons, but principally because it exceeded Congressional authority and infringed state rights. *Id.* at 323.

While South Carolina was the only named plaintiff in the case, Alabama, Georgia, Louisiana, Mississippi, and Virginia joined the case as *amici curiae*, arguing the VRA's unconstitutionality. *Id.* at 307 n.2.

the problems it sought to remedy.[18] The Court held that "[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[19] While the Court's strong language indicated a justification for the VRA's passage, it also suggested a pro-active court, willing to enter the "political thicket" of redistricting to invalidate racially discriminatory voting systems.[20]

The Court carried that approach a step further in the landmark case *Allen v. State Board of Elections*.[21] In *Allen*, the Court reviewed whether private litigants could bring a cause of action under section 5.[22] Although the Act did not address the subject explicitly, the Court held that private litigants have standing to sue under section 5 of the VRA because the Statute implied a private right of action.[23] After *Allen*, minorities suffering from vote dilution could protect their voting rights even if the Justice Department failed to object to an apportionment plan.[24] More importantly, however, *Allen* was pivotal because it marked the Court's intention to read section 5 broadly, holding that the statute applies to even the most remote changes in state voting systems.[25]

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[18] *Id.* at 308-16. The Court noted that when Congress passed the VRA, it confronted what it believed were especially "insidious" violations of the Constitution. *Id.* at 309. Therefore, Congress passed a "sterner and more elaborate" law to accommodate the Fifteenth Amendment's purposes. *Id.*

[19] *Id.* at 308. *See supra* notes 10, 11, and accompanying text for a brief explanation of prior racial discrimination in voting.

[20] *See* Colegrove v. Green, 328 U.S. 549, 556 (1946). *Colegrove* first introduced the notion of the "political thicket," holding that the court system should not interfere with voting matters because they are political in nature. *Colegrove*, 328 U.S. at 556.

However, the Supreme Court subsequently reversed *Colegrove* and held voting rights matters justiciable. *See* Baker v. Carr, 369 U.S. 186, 237 (1962) (holding reapportionments are not political questions and are thus justiciable). Furthermore, two years later, the Court ruled an Alabama voting scheme unconstitutional because it unfairly diluted urban vote. Reynolds v. Sims, 377 U.S. 533, 568 (1964). Thus, *Baker* and *Reynolds* were important precedents, opening the door to claims against state voting systems for minority vote dilution. *See* Javier Aguilar, *Congressional Redistricting in Texas: Time for a Change*, 27 STETSON L. REV. 781, 782 (1998) (stating *Baker* represented shift after which federal courts could review redistricting decisions under Equal Protection Clause).

[21] 393 U.S. 544 (1969).

[22] *Allen*, 393 U.S. at 554. The case consolidated four separate actions, three from Mississippi and one from Virginia, which challenged statutes that lessened minority voting effectiveness. *Id.* at 550-54.

[23] *Id.* at 557. The Court held that if private citizens could not seek judicial enforcement of the prohibition, section 5 "might well prove an empty promise." *Id.*

B. Section 5 and the Non-Retrogression Principle

While *Allen* promised minorities a new weapon to combat discriminatory voting practices, the Court rendered a bittersweet decision for minority voters in *Beer v. United States*.[26] The *Beer* Court addressed whether the city of New Orleans' reapportionment plan for its city council elections violated section 5 of the VRA.[27] In the new plan, only one of the seven city council districts was a majority-minority voting district, although nearly half of the city's population was black.[28]

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[24] *Id.* at 556-57. The Court asserted that section 5 covers many states and many more political subdivisions. *Id.* Therefore, the Justice Department, with limited resources, could not possibly identify every new voting scheme that political bodies put in place. *Id.* Thus, private litigants need the right to sue individually under section 5 to supplement the Justice Department's work. *Id.*

[25] PARKER, *supra* note 10, at 97. According to one commentator, *Allen* "marked the turning point" for black Mississippians to combat the State's "massive resistance." *Id.*

After *Allen*, the Supreme Court rendered a variety of decisions extending section 5 coverage to voting changes quite disconnected from reapportionments. *See* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 182-83 (1985) (finding section 5 applicable to changes in filing deadlines); McCain v. Lybrand, 465 U.S. 236, 256-57 (1984) (holding section 5 applied to change from appointed to elected officials); Perkins v. Matthews, 400 U.S. 379, 387 (1971) (holding section applied to location of polling places). *But see* Presley v. Etowah County Comm'n, 502 U.S. 491, 504 (1992) (holding section 5 inapplicable to changes in distribution of power in elected body).

[26] 425 U.S. 130 (1976).

[27] *Beer*, 425 U.S. at 133-34. Pursuant to section 5, New Orleans sought a declaratory judgment in the District of Columbia District Court. *Id.* at 133. The district court dismissed the action holding that plan would abridge blacks' voting rights in New Orleans. *Id.* at 133-34. The city appealed to the Supreme Court. *Id.* at 134.

[28] *Id.* at 134-35. At the time of the case, approximately 600,000 people inhabited New Orleans. *Id.* at 134. Fifty-five percent of that population were white, and 45% were black. *Id.* In terms of registered voters, 65% were white, and 35% were black. *Id.*

Therefore, assuming racial bloc voting, it was likely the minority could elect its preferred candidate in only one district.[29] In comparison, the pre-existing scheme provided no district in which a minority would be likely to elect its preferred candidate.[30] The Supreme Court held that even though the new apportionment plan vastly under-represented minorities in the city, it did not violate section 5.[31] The Court reasoned that Congress designed section 5 to prevent state legislatures from undoing newly acquired minority rights after the VRA's passage.[32] Therefore, a plan was impermissible under section 5 only if it led to retrogression, or a decrease, in the minority's "effective exercise" of its voting strength.[33] Following that logic, the Court held that if a new system actually increased the likelihood of minority representation, the plan could not possibly violate section 5.[34]

Since *Beer* initially developed the nonretrogression principle it has become an essential element in voting rights cases.[35] Nonretrogression, however, remains a challenging and imprecise principle mainly because of its difficult operation in situations distinguishable from *Beer*.[36] That is, the most troubling application of nonretrogression has proved to be when courts cannot determine a "benchmark" plan with which to compare a new scheme because racial, population, and apportionment factors have changed.[37] In one such situation, in *Abrams v. Johnson*,[38] the Supreme Court held that when a jurisdiction adds an electoral district, but the number of majority-minority districts remains the same, there is no retrogression.[39] Similarly, in *City of Richmond v. United States*, the Court held that a plan which decreased the minority population of a jurisdiction did not violate section 5.[40] Finally, in *Bush v. Vera*,[41] the Supreme Court found that when a jurisdiction experienced an increased allotment of congressional districts, the jurisdiction could not use section 5's nonretrogression mandate to increase the minority representation in an existing electoral district.[42]

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[29] *Id.* at 136. The Supreme Court adopted the District Court's premise of racial bloc voting for its analysis. *Id.*

[30] *Id.* at 135. Of the five representative council districts, only one district had a majority-minority population. *Id.* However, even in that district, minorities represented only one-half of the voting population. *Id.*

[31] *Id.* at 142. The Court stated the plan did not have the effect of denying or abridging minority votes within the meaning of section 5. *Id.*

[32] *Beer*, 425 U.S. at 140. The Court stated that "Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Id.*

[33] *Id.* at 141. The Court interpreted the purpose of section 5 to prohibit "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*

[34] *Id.* at 141. The Court found that New Orleans' new apportionment plan, although less representative than ideal, was actually "ameliorative" and thus retrogression was logically impossible. *Id.*

[35] *See* J. Philip Calabrese, Book Note, 35 HARV. J. ON LEGIS. 289, 290 (1998) (reviewing RICHARD K. SCHER, ET AL., VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF DISTRICTING (1996)) (referring to retrogression as important tool). *But see* John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1212-13 (1998) (arguing nonretrogression principle inadequate as principle of constitutional law because law's constitutionality depends on state of affairs that existed prior to change in voting system).

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[36] *See* Frederick G. Slabach, *Race, Redistricting and Retrogression in Mississippi after the 2000 Census*, 68 MISS. L.J. 81, 87 (1998) (noting that courts have done very little to alter nonretrogression from its principle analysis in *Beer*). In general, courts choose to determine retrogression on a case-by-case basis. *Id.* at 88.

[37] *See generally* Karlan, *supra* note 6, at 741-53 (discussing difficulties in determining benchmarks). The Supreme Court has held that the general standard for determining a benchmark under section 5 is to compare the proposed voting practice against the existing voting practice. Holder v. Hall, 512 U.S. 874, 883 (1994). However, Professor Karlan has urged that because a mechanical application of retrogression is so difficult in situations in which the population or apportionment changes courts should assess the new plan's overall fairness, considering its level of proportional representation. Karlan, *supra*, at 750-51. Supreme Court precedent gives some credence to Professor Karlan's theory. *See* City of Richmond v. United States, 422 U.S. 358, 370 (1975) (stating that annexation that required city adopting ward plan of representation correctly afforded minorities "representation reasonably equivalent to their political strength in the enlarged community"). *But see* 42 U.S.C.A. § 1973(b), *infra* note 48 (outlining 1982 amendment to VRA which stated proportional representation invalid).

[38] 521 U.S. 74 (1997).

[39] *Abrams*, 521 U.S. at 97-98. In *Abrams*, the benchmark plan had 10 electoral districts with one majority black district. *Id.* at 97. The proposed plan still contained one majority-minority district, but had 11 total districts. *Id.* Therefore, the percentage of majority-minority districts would shrink from 10% to 9%. *Id.* The Court noted that if such a plan was retrogressive, then each time a state added an electoral district section 5 would require the state to make the district majority-minority. *Id.* at 97-98.

[40] *City of Richmond*, 422 U.S. at 370-71. In *City of Richmond*, the Court reviewed an annexation plan by Richmond, Virginia that would have decreased the minority population from 52% to 42% of the population. *Id.* at 363. Holding the plan did not violate section 5, the Court reasoned that to hold otherwise would prohibit annexations and possibly over-represent the minority community. *Id.* at 371.

C. Section 2 and the 1982 Amendments

As previously mentioned, Congress enacted section 2 of the VRA to prohibit discrimination in voting procedures and practices.[43] Until 1982, the nation's courts interpreted that to mean that no jurisdiction could enact or apply voting procedures that intentionally discriminated on the basis of race.[44] However, in part because jurisdictions continued to disguise their discriminatory intent,[45] and in part because the Supreme Court announced a nearly impossible standard for section 2 claims,[46] Congress amended the section to provide that a voting scheme was unconstitutional if it had a discriminatory effect, not just a discriminatory purpose.[47] Furthermore, the Amendment provided that courts must discern a discriminatory effect from the "totality of the circumstances" surrounding a voting plan.[48]

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[41] 517 U.S. 952 (1996).

[42] *Vera*, 517 U.S. at 982-83. In *Vera*, Texas ultimately sought to defend its reapportionment which appellees had attacked under the Fourteenth Amendment. *Id.* at 957. As part of its strategy, the State argued that it designed the district in question, which increased the African-American population in the district from 40.8% to 50.90%, because it had a compelling state interest in complying with section 5. *Id.* at 982. The Court rejected that argument, reasoning that the plan augmented the African-American population in the electoral district, rather than maintaining it. *Id.*

[43] *See supra* note 12 and accompanying text.

[44] *Cf.* Shannon L. Vandiver, Comment, *A Return to the Basics: Constitutional Answers to the Racial Gerrymandering Questions*, 21 CAMPBELL L. REV. 99, 103 (1998) (stating that as originally enacted, section 2 only tested voting practices for intentional discrimination)

[45] See *infra* notes 103-10 and accompanying text. The actions of the Mississippi legislature were representative of many other state legislatures throughout the country. *See supra* notes 103-10 and accompanying text.

[46] Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986). The 1982 Amendment was a legislative response to the Supreme Court's impossible standard of proof set forth in *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (holding plaintiffs must show proof that contested voting mechanism was adopted as purposeful device to further racial discrimination). *Gingles*, 478 U.S. at 43-44. Prior to *Bolden*, the nations' courts followed a more flexible test that the Supreme Court established in *White v. Register*, 412 U.S. 755, 766 (1973) (stating test for minority vote dilution is whether process leading to nomination and election was not equally open to participation, so that minorities had less opportunity to participate in electoral

There was some uncertainty about the Amendment's application until 1986, when the Court decided *Thornburg v. Gingles*.[49] In *Gingles*, the Court asserted that a valid section 2 claim rested on a synthesis of historically discriminatory and disadvantageous social conditions with a certain electoral practice that gave the system a discriminatory effect.[50] In its analysis, the Court provided three factors for assessing a section 2 minority vote dilution claim: a minority group must demonstrate that (1) it is sufficiently large and geographically compact enough to constitute a majority in an electoral district, (2) it is a politically cohesive group, and (3) that the white majority can and does vote as a bloc to defeat the minority's preferred candidate.[51] The *Gingles* decision implied that when a minority group satisfies its burden of proof, a state must adopt sufficient majority-minority districts to give the minority a chance to elect its preferred candidate.[52]

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process). *See, e.g.,* Nevett v. Sides, 571 F.2d 209, 217-29 (5th Cir. 1978) (interpreting *White* to mean that objective factors could establish intent).

[47] 42 U.S.C.A. § 1973(a) (West 1994). The current statute provides:

> No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race [or] color.

Id. (emphasis added).

[48] 42 U.S.C.A. § 1973(b). Moreover, the 1982 Amendment counsels that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

[49] 478 U.S. 30 (1986)

[50] *Gingles*, 478 U.S. at 47. The Court stated, "The essence of a [section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.*

[51] *Id.* at 50-51.

[52] Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1364 (1995). The holding in *Gingles* required that when cohesive minorities faced hos-

II. A Recent Response to Gerrymandering: The Influence District

While *Beer* and *Gingles* provide an appropriate analytical starting point for Voting Rights Act claims, recent responses to racial gerrymandering may significantly affect future voting rights cases. To understand the potential effect, one must first recognize the three basic forms of racial gerrymandering, "cracking," "packing," and "stacking."[53]

Cracking, the most traditional form,[54] occurs when a state legislature apportions its districts by splintering a large and cohesive black community into several majority white communities.[55] The result is that the minority voting group no longer has a majority in any district, and minority votes are divided in a way that they have no real effect on white districts either.[56]

Slightly different from cracking, stacking is a form of vote dilution in which a legislature draws districts that combine a large minority population with a slightly larger majority population.[57] Therefore, a bloc-voting white majority may deny minority voters the effective exercise of their votes. In the process, a cohesive bloc-voting minority will lose by a narrow margin and waste its votes.

Finally, a legislature may choose to pack its districts. When a legislature packs, it places as many minority voters as possible into one district, thus leaving the remaining districts with heavy white majorities.[58] Packing is likely to occur when a state has a large minority population and a white legislature

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tile bloc-voting majorities, states must adopt majority-minority districts if possible. *Id.*

[53] Parker, *supra* note 10, at 48-51.

[54] Jack Quinn et al., *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 Geo. Mason U. Civ. Rts. L.J. 207, 209 (1990). "Cracking" is almost always the form of vote dilution in congressional redistricting. *Id.*

[55] Parker, *supra* note 10, at 48-51.

[56] *Id.* The Mississippi legislature used this gerrymandering form from the 1960s to the 1980s to prevent a majority-minority district. *Id.*

[57] *Id.*

[58] *Id.*

must concede at least one district to minorities.[59] Packing advocates believe that creating one super-majority district dilutes minority influence in other districts.[60]

While cracking and stacking are historically important, the response to packing has been one of the most intriguing areas of voting rights law in recent years. Because packing critics argue the method "wastes" minority votes which other districts could utilize[61] they prefer minimizing the margin of majority and creating "influence districts" to supplement a majority-minority district.[62] However, it is unclear whether federal courts may require state legislatures to adopt influence districts to remedy minority vote dilution.[63]

The Supreme Court first recognized the constitutional possibilities of influence districts in *Davis v. Bandemer*.[64] In *Bandemer*, Indiana's Republican-controlled state legislature had gerrymandered the State's legislative districts so that Republicans acquired a greater percentage of seats in the legislature than the percentage of votes they received.[65] Following the election, Indiana Democrats attacked the plan as unconstitutional.[66] Although the Court found that the Indiana Democrats had failed to prove a constitutional claim,[67] in dicta Justice White noted that an electoral system that would "consistently degrade" a group's "influence on the political process" was unconstitutionally discriminatory.[68]

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[59] *Id.*

[60] Alan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 19 (1993). To prove unlawful packing, a minority group must demonstrate (1) that the packing effect of an apportionment was not an incidental consequence of residential patterns, (2) the minority group is politically cohesive, (3) that a bloc-voting majority would defeat the minority's preferred candidate, (4) that the district wastes minority votes by concentrating minorities beyond the level needed for political effectiveness, and (5) that the apportioning body can create unpacked districts with sufficient minority concentration to provide minorities a realistic potential to elect candidates of their choice. *Id.*

[61] *Id.* at 19-20.

[62] *Cf.* Beth A. Levene, Comment, *Influence-Dilution Claims under the Voting Rights Act*, 1995 U. CHI. LEGAL F. 457, 468 (1995). One commentator noted that the VRA's legislative history demonstrates Congress' desire to protect minorities' "political effectiveness." *Id.* at 467-68. She asserted that such effectiveness is not limited to "the power to elect," but also includes the ability to "persuade" or influence. *Id.* at 468.

[63] *See* Stanley Pierre-Louis, Comment, *The Politics of Influence: Recognizing Influence Dilution Claims Under § 2 of the Voting Rights Act*, 62 U. CHI. L. REV. 1215, 1216 (1995) (stating that neither Supreme Court nor Congress has indicated whether VRA recognizes influence dilution claims).

[64] 478 U.S. 109 (1986).

[65] *Bandemer*, 478 U.S. at 113-15. The Indiana legislature began the reapportionment process in 1981 based on the 1980 census figures. *Id.* at 113. Analysts

Subsequently, in *Voinovich v. Quilter*,[69] the Supreme Court addressed whether or not Ohio's failure to adopt influence districts violated section 2 of the VRA.[70] The Court held the reapportionment did not violate the VRA.[71] The Court noted that the plaintiffs failed to satisfy their burden of proof that under the "totality of the circumstances" the apportionment system caused minority vote dilution.[72] Furthermore, the Court held that under the three-part *Gingles* test, the plaintiffs could not meet their burden of proving that the white majority bloc-votes to defeat minority interests.[73]

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generally considered Indiana a "swing state" in that neither the Democrats nor Republicans held power consistently. *Id.* at 114 n.1. However, at the time of the case, Republicans held majorities in both the Indiana House of Representatives and Senate. *Id.* at 113-14. Furthermore, Indiana's governor was Republican. *Id.* In the resulting elections, although Democratic candidates for the State house received 51.9% of the popular vote, Democrats only attained 43% of the house seats. *Id.* at 115.

[66] *Id.* The Indiana Democrats claimed the plan violated the Equal Protection Clause of the Constitution. *Id.*

[67] *Id.* at 129-34. The Court began its analysis by recognizing that political gerrymandering cases are justiciable. *Id.* at 127. Nevertheless, the Court reversed the district court, stating that the lower court applied an insufficiently strict legal standard. *Id.* at 113. In particular, the Court rejected an approach that would make "any interference with an opportunity to elect a representative of one's choice" unconstitutional. *Id.* at 133.

[68] *Id.* at 132-33. Justice White suggested an appropriate test for influence dilution claims might be whether a minority group has been denied an opportunity to "effectively influence the political process." *Id.*

[69] 507 U.S. 146 (1993)

[70] *Voinovich*, 507 U.S. at 149-52. The Court also addressed whether or not Ohio's apportionment board violated the Fourteenth and Fifteenth Amendments. *Id.*

[71] *Id.* at 154-58.

[72] *Id.* at 155. The Court held that the district court erred in ruling that a majority-minority district can only be established to remedy voting rights violations. *Id.* The Supreme Court reasoned that the district court misinterpreted *Gingles* and the "totality of circumstances" test under section 2. *Id.*

[73] *Id.* at 157-58. Even the appellees conceded that Ohio did not suffer from

Although neither *Bandemer* nor *Voinovich* recognized an influence district dilution claim, read together the cases provide an opening for future claims.[74] If the *Voinovich* Court had intended to nullify influence districts, it could have negated them on legal rather than evidentiary grounds.[75] Furthermore, *Bandemer* expressed a policy potentially favoring influence districts.[76] Therefore, any new state apportionment should consider the value of influence districts and that the federal government may require them in response to packing.[77]

III. THE POST-1990 VOTING RIGHTS CASES

Voting rights cases from the 1960s through the 1980s generally represented a movement favoring increased minority voting strength.[78] However, throughout the 1990s, the Supreme Court rendered key decisions that have appalled proponents of increased minority voting strength.[79]

First, in *Shaw v. Reno*,[80] the Court reviewed whether North Carolina's 1992 congressional reapportionment, which resulted in a bizarrely drawn majority black district, was constitutional.[81] Unlike the previous voting rights cases dis-

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"racially polarized" voting. *Id.* at 158.

[74] *See supra* notes 68-73 and accompanying text.

[75] *Voinovich*, 507 U.S. at 154. The Court stated, "We have not yet decided whether influence-dilution claims such as appellees' are viable under Section 2 . . . nor do we decide that question today. Instead, we assume for the purpose of resolving the case that appellees in fact have stated a cognizable Section 2 claim." *Id.*

[76] *See supra* note 68 and accompanying text.

[77] *Cf.* Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) (stating that vote dilution can occur by packing minority votes, thus reducing minority influence). *See also infra* note 98.

[78] *See* Jaren D. Wilcoxson, Miller v. Johnson: *An Improper Emphasis of Form Over Substance*, 76 B.U. L. REV. 771, 780-81 (1996) (noting that Warren Court interpreted VRA broadly, although Burger Court had more restrictive view).

[79] *Id.* at 799. One commentator noted that *Miller* contradicted public policy because race-conscious districting is important in achieving a representative legislature. *Id.*

[80] 509 U.S. 630 (1993).

[81] *Shaw*, 509 U.S. at 634-36. Due to its population growth in the 1980s North Carolina was entitled to an additional seat in its 1992 apportionment, giving the

cussed, the issue in *Shaw* was whether the reapportionment plan violated the Equal Protection Clause of the Fourteenth Amendment.[82] Specifically, the appellants argued that when electoral districts are drawn in a manner in which they can only be explained on racial grounds, the apportionment violates their constitutional right to participate in a "'color-blind' electoral process."[83] In a landmark decision, the Court ruled the scheme unconstitutional and held that any apportionment scheme with race-based voting districts without a compelling justification violated the Equal Protection Clause.[84]

In 1995, the Supreme Court clarified *Shaw* in another important decision, *Miller v. Johnson*.[85] In *Miller*, the Court

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state a total of twelve seats. *Id.* at 633. North Carolina's population in 1990 was 78% white, 20% black, and 1% Native American. *Id.* at 634. The black population was not cohesive. *Id.* Pursuant to section 5, North Carolina submitted its reapportionment plan, which included one majority-minority district, to the Justice Department. *Id.* However, the Attorney General objected to the plan, arguing that the state could create a second majority-minority district. *Id.* at 635. North Carolina did not seek a declaratory judgment. *Id.* Instead it complied with the Attorney General's suggestion and created a second majority-minority district. *Id.* In summarizing the resulting majority-minority district, the Court stated, "[The district] winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.* at 635. After the redistricting, a group of private citizens filed suit against Attorney General Janet Reno and North Carolina alleging the reapportionment plan violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 636.

[82] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment's Equal Protection Clause reads, no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[83] *Shaw*, 509 U.S. at 641-42. *Cf.* Hunt v. Cromartie, 119 S. Ct. 1545, 1551 (1999) (noting political gerrymanders, which may significantly affect certain racial groups more than others, are not *per se* violative of Constitution).

[84] *Shaw*, 509 U.S. at 644-649. The Court found the case justiciable under the Fourteenth Amendment and held that the North Carolina reapportionment plan, like any other law classifying citizens by their race, required strict scrutiny. *Id.* However, the Supreme Court has distinguished voting rights claims from equal protection claims. Miller v. Johnson, 515, U.S. 900, 911 (1995). In *Miller*, the Court held that in a vote dilution case, the government has unlawfully minimized the effect of a minority's vote. *Miller*, 515 U.S. at 911. However, in an Equal Protection case, the government has unlawfully classified voters on the basis of their race. *Id.*

[85] 515 U.S. 900 (1995).

addressed whether Georgia's reapportionment plan following the 1990 census violated the Fourteenth Amendment.[86] The Georgia case differed from *Shaw* because the appellants did not claim the additional majority black district drawn was bizarrely shaped.[87] Instead, the appellants argued the Act's legislative history demonstrated that race was the predominant factor Georgia applied in its redistricting, and therefore the law was unconstitutional under *Shaw*.[88] The Court used the opportunity to stress that the bizarreness of *Shaw's* North Carolina district was merely circumstantial evidence demonstrating how a state may use race as a predominant redistricting factor.[89] Instead of bizarreness, the Court held that plaintiffs must prove the legislature "subordinated traditional race-neutral districting principles [like] compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[90] Applying those rules, the Court held that the Georgia reapportionment violated the Fourteenth Amendment because the Act's legislative history reflected the state's desire to maximize minority voting strength.[91]

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[86] *Miller*, 515 U.S. at 903-04. The issue was whether the Georgia apportionment gave rise to an equal protection claim as announced in *Shaw* and, if so, whether it was legitimate as a narrowly tailored law to serve a compelling governmental interest. *Id.*

[87] *Id.* at 910. The 1990 census resulted in Georgia receiving an additional congressional seat. *Id.* at 906. In the pre-existing apportionment scheme, Georgia had one majority black district. *Id.* Although the new scheme increased majority black districts from one to two, the Justice Department denied preclearance on two separate occasions. *Id.* at 906-07. In response to those denials, the Georgia General Assembly decided to created a third majority-minority district. *Id.* at 907.

[88] *Id.*

[89] *Id.* at 913. The Court noted that the bizarre shape of a district might be relevant as persuasive circumstantial evidence that race, and not other districting principles, was the "legislature's dominant and controlling rationale in drawing its district lines." *Id.* The Court also stated that parties may "rely on evidence other than bizarreness to establish race-based districting." *Id.*

[90] *Id.* at 916. Furthermore, the Court found that based on the Attorney General's prior objection to Georgia's redistricting proposals the State adopted a plan to maximize minority representation. *Id.* at 917.

[91] *Id.* at 917-20. It was obvious Georgia used race as a predominant factor to gain preclearance under the Justice Department's maximization agenda. *Id.* Geor-

The last major redistricting case of the 1990s was *Reno v. Bossier Parish School District*,[92] a case differing from *Shaw* and *Miller* because it did not apply the Equal Protection Clause to a reapportionment.[93] In *Bossier Parish*, a local branch of the NAACP challenged the Bossier Parish, Louisiana School Board's reapportionment of its twelve electoral districts.[94] The proposed scheme provided no majority-minority electoral districts although the school district had a significant minority population.[95] Despite the plan's obvious discriminatory consequences, since neither the pre-existing nor proposed plan adopted any majority-minority districts the proposed plan was not retrogressive.[96] Nevertheless, the NAACP challenged the scheme under section 5, claiming a proposed plan's discriminatory effect, in violation of section 2, is an independent reason to deny preclearance under section 5.[97] Noting that section 2 and section 5 have differing functions and are designed "to combat different evils," the Court rejected the NAACP's contention.[98]

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gia had argued that the legislature merely adopted the suggested minority maximization plan so the Attorney General would approve the state's reapportionment. *Id.* at 922. However, the Court held that Georgia's desire to satisfy the Justice Department's preclearance standards was not a compelling interest for classifying its voters on a racial basis, and therefore the law violated the Fourteenth Amendment. *Id.*

[92] 520 U.S. 471 (1997).

[93] *See supra* notes 80-91 and accompanying text.

[94] *Bossier Parish*, 520 U.S. at 475-76. The Bossier Parish School Board had considered two separate plans: one formulated by the parish's primary governing authority and the other formulated by the NAACP. *Id.* at 474-75. The first plan contained no majority-minority electoral districts, while the second plan contained two majority-minority districts. *Id.* The board eventually adopted the former plan. *Id.* at 475.

[95] *Id.* at 474-75. In the existing scheme, the three districts with the most minorities respectively contained 46.63%, 43.79%, and 30.13% minority population. *Id.*

[96] *Id.* at 474-76. Because neither the former plan nor the proposed plan contained any majority-minority districts the parties stipulated that the proposed plan was not retrogressive. *Id.* at 475.

[97] *Id.* at 476-77. The board filed an action for declaratory judgment in the United States District Court for the District of Columbia seeking preclearance. *Id.* at 476. Subsequently, the NAACP intervened. *Id.*

[98] *Id.* at 477. The Court reasoned that to hold otherwise would impermissibly

The voting rights cases of the 1900s have effectively restricted the growth of the VRA and other means to increase minority voting strength.[99] Therefore, when evaluating the legitimacy of any 2002 reapportionment, one must consider the Supreme Court's current temperament as well as the refined constraints of today's voting rights law.

IV. FACTORS IN MISSISSIPPI REAPPORTIONMENTS

A. *Mississippi's Guidelines and Standards for Apportionment*

Mississippi law explicitly defines the guidelines and standards the legislature should follow when reapportioning. Mississippi's reapportionment statute provides that districts should be compact and contiguous, and it discourages dividing counties and crossing governmental and political boundaries.[100] Those are familiar, constitutionally acceptable prin-

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substitute section 2 standards for section 5 standards. *Id.* at 481-85. The Court asserted that it was merely following federalism principles by deferring to congressional intent in setting differing standards for sections 2 and 5. *Id.* After determining the primary issue, the Supreme Court vacated the district court's decision denying preclearance and remanded the case for further consideration. *Id.* at 490. The Court left open a secondary issue the appellants had presented: whether a plan without a retrogressive effect could nonetheless violate section 5 because it had a discriminatory purpose. *Id.* at 486.

Additionally, in a brief concurrence, Justice Thomas appeared to recognize the value of influence districts. *Id.* at 491 (Thomas, J., concurring). Justice Thomas noted that by increasing majority-minority districts, an apportionment plan necessarily decreases minority influence in surrounding districts. *Id.* at 491 (Thomas, J., concurring).

On remand, the district court granted preclearance. Bossier Parish Sch. Bd. v. Reno, 7 F. Supp. 2d 29, 32 (D.D.C. 1998). Subsequently, the Supreme Court granted certiorari to address its previously unresolved issue: whether a section 5 purpose inquiry can extend beyond an examination for "retrogressive intent." Reno v. Bossier Parish Sch. Bd. (Bossier Parish II), 120 S. Ct. 866, 868 (2000). Noting the limited scope of a section 5 discriminatory effect under *Beer*, the Court refused to extend section 5 inquiries beyond nonretrogressive vote dilution. *Bossier Parish II*, 120 S. Ct. at 875-78.

[99] *Cf.* Mark S. Nagel, *Constitutional Limits on Racial Redistricting:* Miller v. Johnson, 115 S. Ct. 2475 (1995), 19 HARV J.L. & PUB. POL'Y 188, 196 (1995) (stating *Shaw* and *Miller* severely limit state legislatures' ability to draw race-based districts).

[100] MISS. CODE ANN. § 5-3-101 (1972). The statute reads:

ciples.[101] However, while the statute identifies several districting guidelines, it fails to mention one of the most important factors in past redistricting: race.[102]

B. Past Racial Discrimination in Mississippi Apportionments

Mississippi has a long and embarrassing history of racial discrimination. The state's history of segregation and minority intimidation are well documented, and a detailed accounting is unnecessary for this comment.[103] The openness with which the white power structure in Mississippi opposed advances in minority equal rights is remarkable.[104] Considering that position, it is hardly surprising that after Congress passed the VRA in 1965, the Mississippi legislature strengthened its resolve to suppress minority voting rights.[105] However, it is important to note that in its race-based-redistricting after the VRA, the legislature learned to cloak its intentions in official proceedings and thus made it difficult to prove intentional vote dilution under the VRA.[106] Because the Mississippi leg-

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> (a) Every district shall be compact and composed of contiguous territory and the boundary shall cross governmental or political boundaries the least number of times possible; and (b) Districts shall be structured, as far as possible and within constitutional standards, along county lines; if county lines are fractured, then election district lines shall be followed as nearly as possible.

Id.

[101] *See supra* note 90 and accompanying text.

[102] Telephone Interview with Jere Nash, a Jackson, Mississippi Democratic political consultant (Nov. 12, 1998). "Historically, the two most important factors in Mississippi redistricting have been protecting incumbents and screwing black folks." *Id.*

[103] *See generally* PARKER, *supra* note 10. Parker's book gives a detailed treatment concerning black Mississippians' struggle for the right to vote. Included in his analysis is a history of Mississippi's generally discriminatory practices. *Id.*

[104] *Id.* at 102. The Mississippi legislature was one of the most powerful institutions in America dedicated to preserving white supremacy and racial segregation. *Id.* The legislature openly resisted the Supreme Court's school desegregation mandate in *Brown v. Board of Education*. *Id.* Furthermore, Mississippi established the State Sovereignty Commission as an official body to undermine segregation. *Id.*

[105] *Id.* at 39.

[106] *Id.* at 36. According to Parker:

> The open defiance, emotional public appeals, and blatant white suprema-

islature successfully concealed its intentions as it passed law after law diluting minority voting strength the status quo in Mississippi congressional districts remained for two decades.[107] The trend continued until the early 1980s, when the Department of Justice and Congress took steps to address the VRA's ineffectiveness.[108] During the legislature's strongest resistance period, spanning from 1966 to 1982, it successfully gerrymandered Mississippi's Congressional Districts to prevent a black voting majority in any district.[109] Finally, in

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> cist rhetoric that characterized the legislative nullification strategy against desegregating the public schools were largely absent in the campaign against the black vote. White political leaders had found that their racial statements could be used against them in court to strike down such openly racial legislation, and therefore overt racial rhetoric was replaced by coded language.

Id. The lawmakers used the coded language to prevent any evidence of discriminatory intent that would satisfy the VRA (before the 1982 amendment). *Id.* at 39.

[107] *Id.* In 1966, the state legislature convened in Jackson and thwarted minority voting strength without officially displaying its intentions. *Id.* That year the legislature enacted 13 major election laws that significantly undermined minority voting strength. *Id.* at 38. During the 1966 session, legislators introduced approximately 30 bills that were elections-related. *Id.* Thirteen of the bills passed. *Id.* at 38. The effects of the enactments included racial gerrymandering, shifting to at-large voting districts, and authorizing school board appointments rather than elections. *Id.* at 38-41. It passed all 13 laws without publicly revealing its intentions. *Id.*

[108] *Id.* at 91. The first time the Justice Department objected to a Mississippi congressional reapportionment scheme was 1981. The Department argued the system was a "least change" plan because it continued to splinter the Delta into a number of districts. *Id.*

[109] *Id.* at 34. By dividing the Delta into three separate districts, the Mississippi legislature effectively prevented any voting district from being majority-minority. *Id.* In 1965, black litigants, specifically the Mississippi Freedom Democratic Party, filed suit against Mississippi for its 1962 apportionment scheme. *Id.* at 86-87. The case, styled *Connor v. Johnson*, 402 U.S. 690 (1971), began as a one-person, one-vote challenge (under the challenged plan, the Second Congressional District had a population of 608,441, while the Fourth Congressional District had a population of 295,072). *Id.* However, during the case's extensive litigation, the *Connor* plaintiffs also claimed that the apportionment was enacted with a discriminatory purpose. PARKER, *supra*, at 87. Eventually, the plaintiffs raised the issue whether or not the apportionment was subject to section 5. *Id.* Although the Mississippi legislature clearly designed its redistricting plan with discriminatory intent, a three-judge panel in Mississippi held the plaintiffs failed to demonstrate the legislature's discriminatory purpose. *Id.* Therefore, the apportionment re-

1982, in response to Congress' 1982 VRA amendment, the State reapportioned its congressional districts to provide a black majority in the Second Congressional District.[110]

C. Mississippi's Current Congressional Profiles

Since the 1960 census Mississippi has had five congressional districts. According to the 1990 census, 2,573,216 people lived in Mississippi.[111] Of that population, 63.5% were white, and 35.6% were black.[112] From that census data, Mississippi apportioned its five congressional districts. Currently, Mississippi has two Republican and three Democratic congressman, all of whom are male.[113] Four of the congressmen are white, and one is black.[114] It is important to understand the nature of the current congressional districts and their representatives in a reapportionment context. Therefore, the Mississippi legislature must consider the following profiles.

1. The First Congressional District

In 1994, the First Congressional District elected Republican state senator, Roger Wicker, as its member of Congress.[115] Wicker won the district handily during the year of the "Republican Revolution" and was easily reelected in 1996 and 1998.[116] As a congressman, Wicker is a conservative

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mained in place. *Id.*

[110] *Id.* at 91.

[111] UNITED STATES CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE (visited Jan. 27, 2000) <http://www.census.gov/population>.

[112] *Id.* In terms of voting age population, 67.5% of the population was white, and 31.6% was black. *Id.*

[113] *See infra* notes 115-69 and accompanying text.

[114] *See infra* notes 115-69 and accompanying text.

[115] PHILIP D. DUNCAN & CHRISTINE C. LAWRENCE, CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA, 1998, THE 105TH CONGRESS 798 (1997). Wicker replaced congressional stalwart Jamie Whitten, a Democrat who served for 53 years. *Id.* at 800. When Whitten finally retired, he was Chairman of the powerful House Appropriations Committee. *Id.*

[116] *Id.* In 1994, Wicker defeated Mississippi state Rep. Bill Wheeler by a 26-point margin. In 1996, he defeated a black man, Henry Boyd, by 37%. In 1998, Wicker did not face a major party challenge.

pragmatist, generally taking conservative positions, but distancing himself from extremists.[117]

Wicker's district covers the northeast region of Mississippi. According to the 1990 Census, 76.8% of the district's 514,548 people are white.[118] The black population represents 22.8% of the district.[119] Although the First Congressional District includes cities such as Tupelo and Oxford, it is an "overwhelmingly rural area."[120] Among the district's chief interests are agriculture, the furniture industry, and forestry-related industry.[121] The district also includes the growing white-collar population in DeSoto County, a Memphis, Tennessee suburb.[122] The result of this combination is a conservative political district.[123]

2. *The Second Congressional District*

The Second Congressional District fits neatly within the historic region known as the Mississippi Delta. The Delta is known nationally as the "Birthplace of the Blues," but in Mississippi it is better known for its devastating poverty.[124] In terms of its economy, the agrarian Delta is heavily dependent on agricultural products and the catfish industry.[125] The Second District is Mississippi's lone majority-minority district with blacks representing 63% and whites 36.6% of the total population.[126] Black Democrat Bennie Thompson has represented the district since 1993, when he won the seat in a special election.[127] Thompson replaced Mike Espy, another black Democrat, who resigned to become the United States Secretary of Agriculture.[128] When the Second District first elected Espy in 1986, he became the first black Mississippian elected to Congress since Reconstruction.[129]

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[117] *Id.* However, despite such posturing, Wicker does take decidedly conservative positions, garnering a 100% rating from the American Conservative Union and a 0% rating from the Americans for Democratic Action in 1996. *Id.* at 798-800.

[118] UNITED STATES CENSUS BUREAU, *supra* note 111.

[119] *Id.* In terms of voting age population, 79.6% is white, and 20% is black. *Id.*

[120] DUNCAN & LAWRENCE, *supra* note 115, at 799.

[121] *Id.*

[122] *Id.*

[123] *Id.* President Bill Clinton only received 42% of the total vote in the First District in both 1992 and 1996. *Id.* at 800.

[124] *Id.* at 802. Although casino gambling in Tunica County has lessened the effect, for a long period of time more than half of the county lived below the poverty level. *Id.*

[125] *Id.* Catfish farmers in the Delta produce approximately 70% of the nation's catfish. *Id.* Soybeans and cotton remain as the Delta's primary cash crops. *Id.*

[126] UNITED STATES CENSUS BUREAU, *supra* note 111. The black and white vot-

It is important to note the crossover effect Congressman Espy had with white voters. When the district first elected Espy in 1986, the election was based on the 1980 census. The corresponding apportionment provided the Second District with a fifty-eight percent black majority population and a fifty-three percent black majority voting age population.[130] However, considering historical discrepancies in black and white voter registration and turnout, blacks probably still did not have a majority on election day.[131] Despite that fact, Espy prevailed. Still, he only garnered twelve percent of the white vote in 1986.[132] In subsequent elections, Espy's margin of victory grew because white moderate voters began to connect with him.[133] Espy's success under the 1980 apportionment scheme demonstrated that, in some situations, a simple black majority could result in a black candidate's election in Mississippi. However, after the 1990 census, the state legislature reapportioned its congressional districts and provided the Second District with a greater black majority.[134] Consequently, assuming racial bloc voting, a black candidate is

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ing age populations are somewhat closer at 58.1% black and 41.5% white. *Id.*

[127] DUNCAN & LAWRENCE, *supra* note 115, at 803.

[128] *Id.*

[129] PARKER, *supra* note 10, at 91. Espy defeated a white Republican incumbent, Webb Franklin. *Id.*

[130] *Id.* at 140.

[131] *Id.*

[132] *Id.* Espy defeated Webb Franklin by 4,800 votes in 1986. *Id.* There was a significant drop in white voter turnout between the 1984 and 1986 elections, which allowed Espy to overcome the white votes. *Id.* at 140-42.

[133] *Cf.* DUNCAN & LAWRENCE, *supra* note 115, at 803. According to one publication, Congressman Thompson's high-profile involvement in the Mississippi civil rights movement made him a less attractive candidate than Espy to white voters. *Id.*

[134] *See supra* note 110 and accompanying text.

assured of a landslide election in that district. As a congressman, Bennie Thompson has not achieved a similar crossover appeal as Mike Espy.[135] Therefore, it is unclear how Thompson would fare with a slimmer majority. However, Espy's achievements reflect that a simple majority may be the only necessity for a minority candidate to succeed.

3. *Third Congressional District*

This district could be the mirror image of the Second District. With 67% of the population white and 31.3% black, a minority candidate could not be elected without tremendous crossover from the white community.[136] For thirty years, G.V. "Sonny" Montgomery served as congressman for the Third Congressional District.[137] When Montgomery, a white Democrat, declined to seek a sixteenth term, several viable candidates entered the race to replace him.[138] Charles "Chip" Pickering emerged as the frontrunner for the position.[139] Pickering, a young white conservative, won the Republican primary in 1996 by portraying his runoff opponent, Bill Crawford, as a liberal because of his support for former Democratic governor, Ray Mabus.[140] In the general election, Pickering defeated his Democratic opposition, John Arthur Eaves, Jr., by a margin of twenty-five points.[141] In 1998, Pickering won reelection easily without a major party opponent.

The Third Congressional District spans the east central region of Mississippi.[142] Beginning with the affluent Jackson suburbs in Madison and Rankin Counties, the district spreads east to the Alabama state line.[143] Other than the Jackson suburbs, rural areas and small cities, such as Meridian and Philadelphia, constitute the district.[144] The combination of the racial makeup, general affluence, and rural vote make the Third District heavily Republican.[145] Significant economic interests in the area include the Meridian Naval Air Station, poultry-processing plants, and timber companies.[146]

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[135] DUNCAN & LAWRENCE, *supra* note 115, at 803.

[136] UNITED STATES CENSUS BUREAU, *supra* note 111. The black voting age population represents 27.9% of the district, and the white voting age population accounts for 70.7%. *Id.* According to state Sen. John Horhn, the third district (as well as the first and fifth) are virtually unwinnable for a black candidate. Gina Holland, *Black Candidates Take Shot in 4th District*, ASSOCIATED PRESS, May 25, 1998, *available in* 1998 WL 7417188.

[137] DUNCAN & LAWRENCE, *supra* note 115, at 804.

[138] *Id.* A total of nine Republican candidates entered the race to replace Rep. Montgomery. *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 805.

4. *Fourth Congressional District*

The Fourth Congressional District is the key district in Mississippi's current congressional apportionment because it is Mississippi's only unpredictable district.[147] According to 1990 Census figures, the district has a total population of 513,853.[148] Of that population, fifty-nine percent is white, and forty-one percent is black.[149] The Fourth District covers southwest Mississippi.[150] Jackson, the capital city, serves as the district's northern boundary. Approximately forty percent of the district's residents live in Hinds County, which is part of the Jackson metropolitan area.[151] The remainder of the population consists of rural areas and the minor urban enclaves of Natchez and Laurel.[152] Generally, the Fourth Congressional District is culturally conservative.[153] Major industries in the district include timber, paper processing, and poultry.[154]

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[142] *See* Appendix A.

[143] DUNCAN & LAWRENCE, *supra* note 115, at 805.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *See infra* notes 184-89 and accompanying text. Because of the high percentage of minorities in the Fourth Congressional District, assuming polarized minority voting, a strong or weak minority voting turnout can determine an election's outcome. *Id.*

[148] UNITED STATES CENSUS BUREAU, *supra* note 111.

[149] *Id.* According to the 1990 census, exactly 58.8% of the population was white, while 40.7% of the population was black. *Id.*

[150] *See* Appendix A.

[151] DUNCAN & LAWRENCE, *supra* note 115, at 807.

[152] *Id.*

[153] *Id.* The district's heavily rural and small-town influence make the district

Moderate white Democrat Ronnie Shows represents the Fourth Congressional District.[155] He was elected in 1998, replacing the retiring Republican, Mike Parker.[156] The Fourth District first elected Parker as a Democrat, replacing Democrat Wayne Dowdy.[157] In 1995, Rep. Parker switched from the Democratic Party to the Republican Party, and the following year he defeated a black Democratic challenger, Kevin Antoine.[158] It is abundantly clear from the 1996 election results that Antoine could galvanize black voters, garnering more than ninety percent of the black vote in some areas.[159] Antoine's ability to attract minority votes made him a viable candidate in 1996. However, Antoine's inability to draw significant white votes provided the election's difference.

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culturally conservative. *Id.*

[154] *Id.* Tourism is also a minor industry particularly in the Natchez area. *Id.*

[155] Included in Congressman Shows' 2000 legislative agenda are measures to provide tax benefits to industries negatively affected by the North American Free Trade Agreement and Republican-opposed legislation to provide prescription drug relief for senior citizens. Dennis Camire, *Shows climbing political ropes*, CLARION-LEDGER (Jackson), Jan. 23, 2000, at 1A.

Congressman Shows recently learned he will face opposition in the 2000 election. Among those seeking to unseat Shows is Republican radio talk-show host Geoffrey Yoste, who recently labeled Shows a "Ted Kennedy Democrat." Emily Wagster, CLARION-LEDGER (Jackson), Jan. 14, 2000.

[156] Reed Branson, *Mississippi Voters Give Crime Victims More Muscle*, COMMERCIAL APPEAL (Memphis), Nov. 4, 1998, at 6D, *available in* 1998 WL 21178309. Ronnie Shows garnered 53% of the vote, and his Republican opponent, Delbert Hosemann, received 45% in the general election. *Id.*

[157] DUNCAN & LAWRENCE, *supra* note 115, at 808.

[158] *Id.* Antoine stunned the heavily favored white candidate, Jackson City Councilwoman Margaret Barrett, in the Democratic primary.

[159] *See* Appendix B. A statistical analysis of Fourth Congressional District voting precincts in Jackson, Mississippi with black populations of 90% or higher reflects that Antoine received 93% of the vote from those predominantly black voting enclaves. *Id.*

5. *Fifth Congressional District*

Mississippi's Fifth Congressional District covers the Mississippi Gulf Coast area and stretches north until it reaches Hattiesburg, one of the state's larger cities.[160] The defense industry dominates the district, employing a substantial number of its residents.[161] In addition to the district's booming defense industry, tourism, casino gaming, and seafood-processing are key industries in the coastal region.[162] In the northern area of the district, timber, poultry, and textiles are the central industries.[163] The Fifth District is Mississippi's most homogenous with seventy-eight percent of the population white and only twenty percent of the population black.[164] Democrat Gene Taylor represents the area as its congressman.[165] Prior to Taylor's election in 1989 Republicans such as Trent Lott and Larkin Smith represented the Fifth District.[166] Although the district consistently reelects Taylor by wide margins, it is ideologically conservative.[167] One must look beyond Taylor's party label to analyze his success in the district. Congressman Taylor supports most high-profile Republican issues, but refuses to leave the Democratic Party because of its blue-collar roots.[168] Although the Fifth District regularly votes Republican in national elections, Taylor compensates for the dearth of Democratic support by championing the defense industry and blasting President Bill Clinton.[169]

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[160] *See* Appendix A.

[161] DUNCAN & LAWRENCE, *supra* note 115, at 810. As many as half of the district's residents may have a connection with the defense industry. *Id.*

[162] *Id.*

[163] *Id.*

[164] UNITED STATES CENSUS BUREAU, *supra* note 111. According to the 1990 census, exactly 78.3% of the Fifth District population is white. *Id.*

[165] DUNCAN & LAWRENCE, *supra* note 115, at 809.

[166] Id. at 811.

[167] *Id.* at 809-11.

[168] *Id.* In 1996, Rep. Taylor received an 80% rating from the American Conservative Union. *Id.* at 811.

[169] *Id.* at 809-11. Despite his party affiliation, Congressman Taylor voted in favor of impeaching President Clinton, a fellow Democrat, for his allegedly perjurious behavior. *Taylor: Go after Saddam, Convict Clinton*, ASSOCIATED PRESS, Jan. 12, 1999, *available in* 1999 WL 3108335.

V. THE 2002 CONGRESSIONAL REAPPORTIONMENT

The key to Mississippi's 2002 congressional reapportionment is that it must not deny or abridge minority votes.[170] The VRA, voting rights case law, and traditional districting principles will serve as guidelines for the state to follow.[171] Principally, the legislature must draw new lines that do not impose retrogression or a discriminatory effect on minority voting strength.[172] However, race may not be the predominant redistricting factor, subordinating other traditional reapportionment principles.[173] Therefore, balancing racial mandates with racial restrictions is the legislature's primary task.[174]

A. *A Hypothetical Proposal*

Because the 2002 reapportionment will not occur until after the 2000 census there is no existing reapportionment plan. Therefore two unknowns, the state legislature's policy position in 2002 and the new census figures, will determine the next plan's appearance.[175] However, assuming no dramatic shifts in policy or population, one hypothetical reapportionment has emerged.[176] In essence, the plan would divide the existing Fourth Congressional District between the other four districts. The legislature would split most of the existing district between the Third and Fifth Districts.[177] The Second Congressional District would expand southwards, absorbing the Fourth's majority-black counties along the Mississippi River. The black population percentage in the Second District could either grow slightly or stay the same under this plan. The First Congressional District would spread to the south, taking three or four counties from the present Third District. The black population percentage in the First District would probably rise slightly with additions such as Clay, Lowndes, and Oktibbeha Counties. However, despite those additions, the black population percentage would remain below thirty percent. The Fifth Congressional District would probably expand to the west, engulfing Marion, Walthall, Pike, and Amite Counties. Accordingly, the minority population would rise to approximately one quarter of the district's population. The remainder of the present Third and Fourth Districts would fuse into a single district extending from East Central to Southwest Mississippi. That district would have a black population of approximately thirty-five percent or less.

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[170] *See* Georgia v. United States, 411 U.S. 526 (1973) (holding reapportionments are covered changes under section 5 of VRA). *See also* 28 C.F.R. § 51.13 (1995) (listing congressional reapportionment as change covered by section 5).

[171] *See supra* note 6 and accompanying text.

[172] *See supra* notes 26-52 and accompanying text.

[173] *See supra* note 90 and accompanying text.

[174] Foreshadowing the importance and delicate nature of any Mississippi reapportionment, one commentator wrote, "Very definitely the whole world will be watching if reapportionment costs the state a House seat, especially if the result is that a state with a large proportion of black citizens again becomes a state with an all-white House delegation." Charlie Mitchell, *A "hairy" prospect: Reshuffling House seats looms*, OXFORD EAGLE, Jan. 13, 2000.

[175] In November 1999, Mississippi held statewide elections, the results of which will be key to the 2002 reapportionment for a variety of reasons. First, those elected to serve in the state House of Representatives and state Senate will ultimately enact Mississippi's next reapportionment. *See supra* note 3 and accompanying text. Second, the majority-Democrat House of Representatives re-elected Tim Ford, a Tupelo Democrat, as Speaker of the House in January, 2000. The speakership is vital to the reapportionment process because the speaker appoints house members to the joint reapportionment committee, which will devise the reapportionment plan. *Id.* The third important result was the election of Democrat Amy Tuck as lieutenant governor. Included in Lieutenant Governor Tuck's

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authority is the duty to appoint members to the joint reapportionment committee. *Id.* Finally, the fourth principal component of the 1999 elections is the election of Democrat Ronnie Musgrove as governor because he will have veto power over any apportionment bill the legislature passes. MISS. CONST. art. IV, § 72. Although any veto is subject to the legislature's override, an override is highly unlikely because it requires a two-thirds vote from the House and Senate. *Id.* Additionally, because of the governor's veto power the Governor will probably be instrumental in the plan's development.

[176] Nash, *supra* note 102. Although there is no set plan, most political insiders concede that a version of the following plan is, if not likely, at least possible. *Id.* The plan explained in this paper is based on the author's analysis of 1998 county population estimates according to the United States Census Bureau and is meant merely to display a theory. Therefore, the reader should regard the exact lines and corresponding figures as secondary in importance to their underlying theories. For a map of the hypothetical plan, *see* Appendix C.

[177] *Court ruling may hurt Mississippi*, ASSOCIATED PRESS, Aug. 25, 1998, *available in* 1998 WL 7439780.

There are two basic reasons why the district would take this shape. First, geographic compactness and contiguity dominate this scheme. The plan develops because the Delta is a geographically and socially distinct area. The Delta forms a natural electoral district in the northwest corner of the state. Because the Delta is concentrated in the area adjacent to the Mississippi River it bisects the northern part of Mississippi into east and west regions. Therefore, the Delta naturally forms the First District as well as the Second. Another peculiar geographical shape in the state is the Gulf Coast region. Because of its panhandle shape, there is simply no feasible way of gerrymandering the Gulf Coast. The congressional district including the Coast may extend to the northwest or northeast to complete its district, but the majority of the district is impenetrable. Therefore, because of the natural shapes of the Delta and the Gulf Coast the current Third and Fourth Districts are the only manipulable districts remaining. That is a key reason most people assume the Third and Fourth Districts will fuse in the 2002 reapportionment.

The second principal reason the speculated reapportionment plan has its shape is due to incumbency. Protecting its incumbents traditionally has been one of Mississippi's most important redistricting factors.[178] The problem with that policy is that there will probably be more incumbents than congressional seats in Mississippi when the legislature redistricts. However, Chip Pickering of the Third District and Ronnie Shows of the Fourth, assuming they are reelected in 2000, will be the most junior congressmen of the state's delegation. Therefore, the legislature is most likely to draw its new district lines so the state's newest congressmen will compete with one another for the combined seat.

B. *Would the Likely Proposal Satisfy the Voting Rights Act?*

When the Mississippi legislature reapportions its congressional districts after the 2000 census, it will either submit its proposal to the Justice Department for preclearance or it will seek a declaratory judgment in the District of Columbia District Court.[179] In either situation, Mississippi must demonstrate the new system does not impose retrogression or a lessening of minority voting strength.[180] If Mississippi submits a variation of the previously outlined plan, it may argue the new system does not cause retrogression because the new voting plan has a majority-minority district similar to the one in the previous scheme.[181] Furthermore, the State may argue that in the previous apportionment, there were four majority white districts, and in the latter, there are only three.[182] Accordingly, it would claim the plan is ameliorative, and according to *Beer*, an ameliorative plan cannot be retrogressive.[183] However, that argument ignores an important factor in Mississippi's current apportionment scheme: the influence district.

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[178] *See supra* note 102 and accompanying text.

1. The 1998 Fourth Congressional District Election: Evidence of an Influence District

In early 1998 then-Rep. Mike Parker announced he would not seek reelection as the Fourth Congressional District's representative. On the heels of Parker's announcement, several would-be congressmen joined the political fray.[184] A crowded Republican primary resulted in a runoff between Jackson tax lawyer Delbert Hosemann and Simpson County banker Phil Davis.[185] Hosemann prevailed in the runoff and became the Republican nominee for Congress.[186] On the Democratic ticket, Southern Transportation Commissioner Ronnie Shows easily won the Democratic primary.[187] Although Hosemann was the better-funded, more polished of the two candidates, Shows defeated the Republican by an eight-point margin.[188] Analysts generally agree the most important factor in Shows' victory was the unified black support he received.[189]

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[179] *See supra* notes 13, 14 and accompanying text.

[180] *See supra* notes 32-35 and accompanying text.

[181] *Id.*

[182] *See supra* notes 36-42 and accompanying text. Although no case law supports this claim, such an inventive argument may pass muster considering no benchmark exists for such an apportionment. *See supra* notes 36-42 and accompanying text.

[183] *See supra* note 34 and accompanying text.

[184] DUNCAN & LAWRENCE, *supra* note 115, at 807.

[185] *Id.*

[186] *Id.*

Although the Shows victory reflects a familiar black-white Democratic coalition in modern Mississippi politics, it also demonstrates that the Fourth Congressional District is an "influence district." With its current forty-one percent black population, a bloc-voting minority can form a coalition with a white minority to elect a candidate of its choice. Although that candidate may not be the minority's ideal candidate, the white candidate will theoretically owe his allegiance in part to the minority community, effectively giving the minority group significant influence over the electoral process.

2. *Retrogression and Discriminatory Effect*

A new apportionment plan could violate the VRA if it ignores the validity of influence districts.[190] In Mississippi, assuming racial bloc-voting, black voters can determine the outcome in two of the five congressional districts.[191] Thus, minority voting has a forty percent actual effect on elections. However, if a new system with only four congressional districts removed an influence district, the black vote would only have a twenty-five percent actual effect. That is retrogression, at least in a literal sense of the word. Under the section 5 retrogression principle, an apportionment plan is unlawful if it lessens the effective exercise of a minority's voting strength.[192] Losing fifteen percent of a minority's actual, or effective, voting strength clearly fits within that framework. Although the Justice Department has traditionally used section 5 nonretrogression to invalidate voting systems that undo a majority-minority district, nonretrogression should apply to the loss of an influence district and its subsequent effect on the entire reapportionment. Therefore, the hypothetical 2002 reapportionment plan would violate the VRA's nonretrogression mandate and would be invalid.[193] Accordingly, the state should identify a better plan, representing appropriate minority voting strength but still remaining within a constitutional framework.

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[187] *Id.*

[188] *Id.*

[189] Nash, *supra note* 102. According to political consultant Jere Nash, three factors proved decisive in Shows' victory: (1) some Republican Davis supporters, disenchanted with Hosemann, did not vote on election day; (2) white voters in the southern, rural area of the district solidly supported Shows; and (3) unified black support. *Id.*

[190] *See supra* notes 53-77 and accompanying text.

[191] *See supra* notes 119, 126, 134, 136, 149, 159, 164 and accompanying text.

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[192] *See supra* notes 31-35 and accompanying text.

[193] Although retrogression probably applies to the proposed reapportionment and therefore it could be challenged under section 5, plaintiffs could also challenge the plan for its discriminatory effect. *See supra* notes 12, 43-52 and accompanying text. Mississippi's current population is approximately 36% black, which is unchanged since the 1990 Census. UNITED STATES CENSUS BUREAU, *supra* note 111. Therefore, if a new congressional apportionment only provided black Mississippians with 25% voting strength, the plan would have a discriminatory effect.

In reviewing a minority vote dilution claim under section 2, a court would review the "totality of the circumstances." *See supra* notes 48-52 and accompanying text. Under a *Gingles* analysis, a court could find the reapportionment violates section 2. The first step of the *Gingles* analysis requires a minority group to demonstrate it is sufficiently large and geographically compact enough to constitute a majority in a single-member district. *See supra* notes 50, 51, and accompanying text. However, in *Voinovich*, the Court held that in an influence district case, that step would not apply. *See supra* notes 70-75 and accompanying text. The second *Gingles* step requires that the minority group must be politically cohesive. *See supra* notes 50, 51, and accompanying text. In Mississippi, more than 90% of black voters frequently vote for the same candidate. Nash, *supra* note 102. Therefore, blacks are politically cohesive within the state. Finally, the third requirement is that Mississippi's white majority must frequently vote as a bloc to defeat the minority's preferred candidate. *See supra* notes 50, 51, and accompanying text. Considering Mississippi has elected only two black congressmen since Reconstruction and Governor Kirk Fordice won statewide elections twice despite nearly unilateral minority support for his opposition reflects that ability to stifle the minority's preferred candidate. DUNCAN & LAWRENCE, *supra* note 115.

Therefore, the reapportionment challenge would probably satisfy *Gingles*' burden of proof for discriminatory effect. However, under *Bossier Parish*, such a finding of discriminatory effect would have no effect on preclearance. *See supra* note 98 and accompanying text.

D. *A Better Plan*[194]

Because an appropriate plan should guarantee against retrogression and a discriminatory effect it should reflect the current scheme's forty percent minority voting effectiveness. However, under the *Shaw* and *Miller* decisions, the State must not make race its predominant factor. Thus, a legal reapportionment plan will combine the racial interests of the VRA with traditional districting factors. A plan combining these interests is natural and requires only minor alterations to Mississippi's existing apportionment.

A more appropriate plan would maintain the basic framework of the First and Second Congressional Districts. The Delta is a contiguous, compact, and socially distinct region. Therefore, it should remain intact as a congressional district. As a byproduct, the First Congressional District would remain essentially intact. However, the new plan would not require the Second District to spread to the south, as the aforementioned plan suggested. The major difference between this plan and the likely 2002 plan is that the Second District would not be as packed with minority votes. The approximate sixty percent minority population is unnecessary to provide effective voting strength.[195] A lesser margin of majority would suffice. As a result, the Second District could ingest current First District counties such as Lafayette, Panola, and Yalobusha. These counties have significant numbers of minority votes, but not black majorities. Therefore, the counties share some common interests with the Second District but would not pack the district.

Essentially, the First and Second Districts would remain the same. Their boundaries would change slightly, and the Second District would have a smaller black majority. Therefore, the area in which this plan diverges from the likely plan the most is the manner in which the Fifth District grows to satisfy its population requirements. In the previous plan, the district would grow to the northwest, taking counties with significant minority populations from the current Fourth District. However, the better plan would leave the Fourth District essentially intact and cause the Fifth District to absorb portions of the Third District. The resulting plan would be one district spanning the Gulf Coast to East Central Mississippi. The other district would be the present Fourth District with the additions of majority-black counties presently in the Second District and several counties from the present Third District. The minority population in that district would remain at approximately forty percent.

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[194] *See* Appendix D. The "Better Plan" is based on the author's analysis of the 1997 census bureau population estimates and general districting principles. *Id.*

[195] *See supra* notes 128-34 and accompanying text. When the Second Congressional District originally elected Mike Espy to Congress, the district only contained a 53% minority population. *See supra* notes 128-34 and accompanying text.

Under this proposed plan, minority voters in Mississippi would be assured of electing one candidate of their choice in the Second Congressional District. Furthermore, minority voters would retain their influence on another election in the southwestern district, which would be the new Third District. The remaining First and new Fourth Districts would have essentially the same majority-minority ratios as they previously had. This plan would provide more than just a twenty-five percent voting effectiveness than the likely proposal. Conceivably, the new plan would give black voters in Mississippi fifty percent effective voting strength. Some white voters would surely challenge such a plan. However, those plaintiffs would not likely prevail. As the *Shaw* and *Miller* cases mandated, race cannot be the predominant factor. However, race, along with other traditional districting principles, may be a factor in reapportionment. In the new apportionment, the legislature must consider race to satisfy the VRA's demands. However, the new plan also meets traditional standards such as contiguity of districts and compactness. Furthermore, the proposed plan would bond the current Third and Fifth Districts. Those two districts are more alike than any others in their interests because they are both conservative, predominantly white, and have strikingly similar economic industries. Therefore, this proposed plan should satisfy the Equal Protection analysis from *Shaw* and *Miller*.

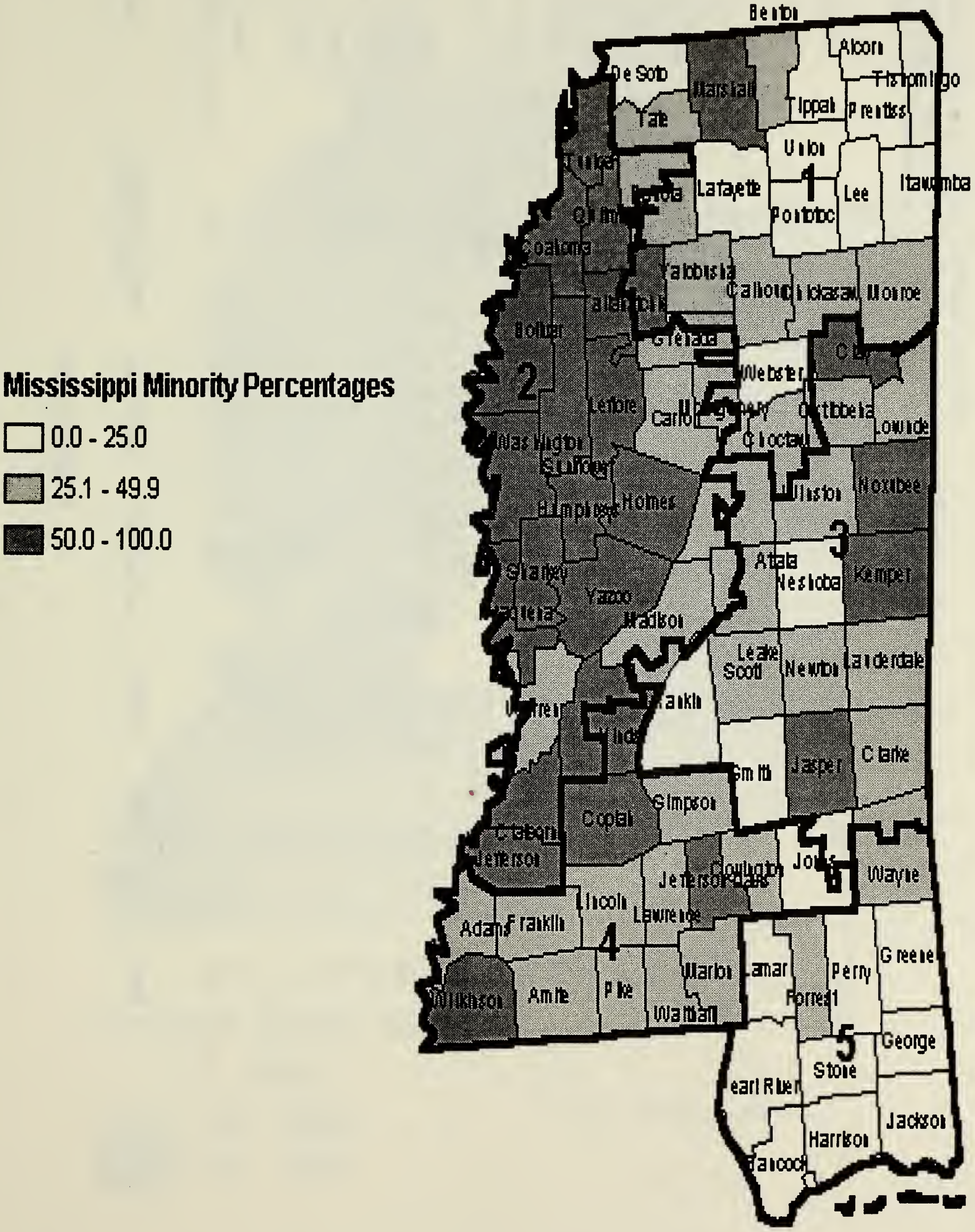
VI. CONCLUSION

When the Mississippi legislature reapportions its congressional districts after the 2000 Census, it must consider the VRA, the Equal Protection cases of the 1990s, and traditional districting factors. Assessing those requirements should lead the legislature to respect the existence and the value of a minority influence district in its congressional apportionment. Regardless of whether Mississippi inserts an influence district in its reapportionment, Mississippi's reapportionment could lead to the next major line of voting rights cases. The Supreme Court may ultimately decide the wisdom of influence districts, and it may base its decision on Mississippi's 2002 reapportionment.

Jason Watkins

APPENDIX A

Mississippi's Current Congressional Districts


Mississippi Minority Percentages
☐ 0.0 - 25.0
▨ 25.1 - 49.9
■ 50.0 - 100.0
1
2
3
4
5
Benton
Alcorn
Tishomingo
De Soto
Marshall
Tippah
Prentiss
Tate
Union
Tunica
Panola
Lafayette
Pontotoc
Lee
Itawamba
Quitman
Coahoma
Yalobusha
Calhoun
Chickasaw
Monroe
Tallahatchie
Bolivar
Grenada
Clay
Webster
Leflore
Carroll
Montgomery
Oktibbeha
Lowndes
Washington
Sunflower
Choctaw
Winston
Noxubee
Humphreys
Holmes
Attala
Sharkey
Neshoba
Kemper
Issaquena
Yazoo
Madison
Leake
Scott
Newton
Lauderdale
Warren
Rankin
Hinds
Smith
Jasper
Clarke
Simpson
Copiah
Claiborne
Jefferson
Covington
Jones
Wayne
Jefferson Davis
Lincoln
Lawrence
Adams
Franklin
Greene
Lamar
Perry
Forrest
Marion
Wilkinson
Amite
Pike
Walthall
George
Stone
Pearl River
Jackson
Harrison
Hancock

APPENDIX B

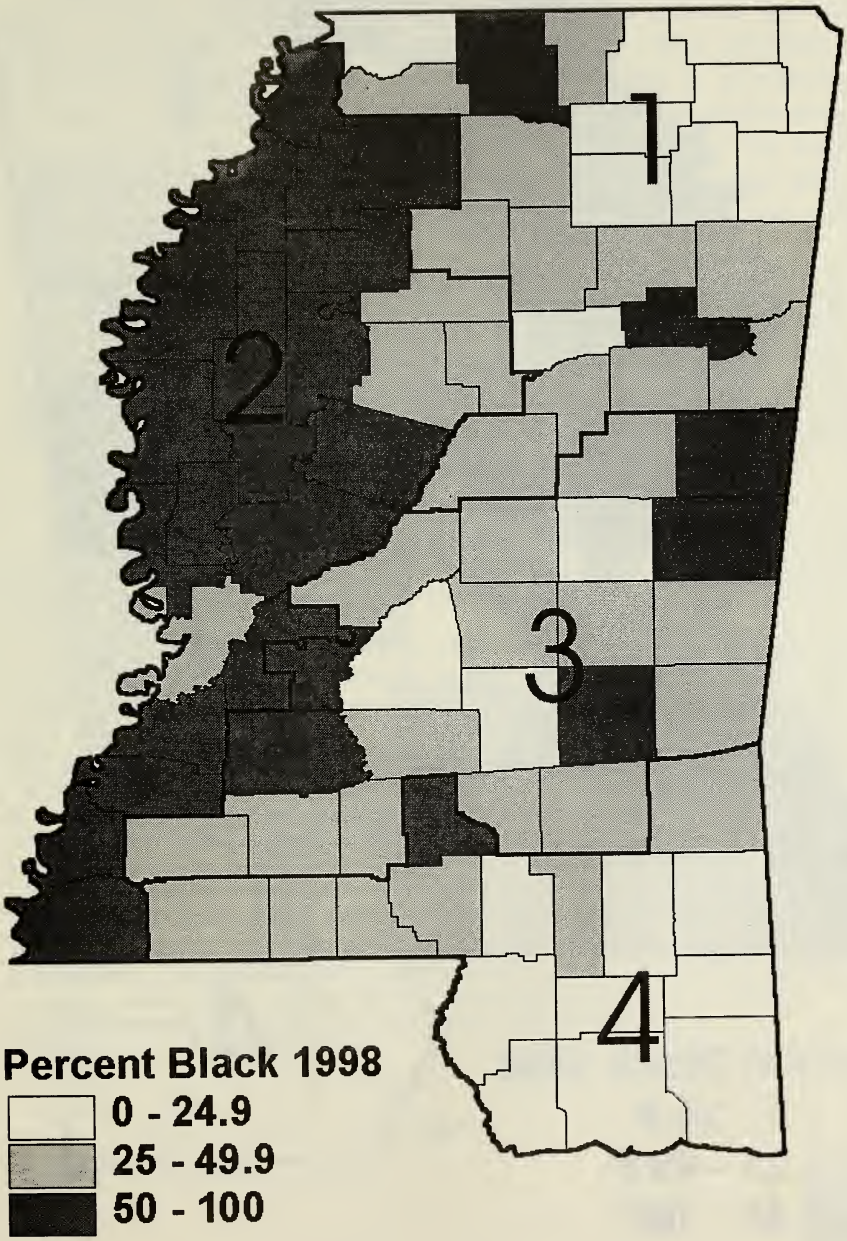
Precinct	% Black Pop.	Antoine	Antoine %	Parker	Parker %	Total
2-Peoples Funeral Home	99%	258	93%	19	7%	277
4-Rowan Middle School	99%	149	93%	12	7%	161
6-121 Millsaps Ave.	98%	113	66%	59	34%	172
10-Galloway Elem. School	98%	246	92%	21	8%	267
18-Wells Mem. Un. Meth. Ch.	95%	363	91%	38	9%	401
19-Goodwill Industries	99%	349	93%	27	7%	376
20-Lanier High School	100%	491	93%	39	7%	530
31-Johnson Elem. School	99%	729	93%	57	7%	786
49-JSU	99%	958	98%	15	2%	973
51-Blackburn Middle School	98%	395	91%	40	9%	435
52-Calvary Baptist Church	91%	543	93%	38	7%	581
56-Fire Station # 6	93%	186	90%	21	10%	207
58-Pearl St. AME	94%	734	94%	51	6%	785
59-Fire Station #14	92%	654	91%	61	9%	715
63-Nazareth Miss. Bapt. Ch.	99%	419	95%	20	5%	439
64-St. James Baptist Chu.	99%	379	94%	24	6%	403
66-Johnny Champion Comm.	100%	34	89%	4	11%	38
82-N. Jackson Elem. School	90%	753	93%	56	7%	809
TOTAL VOTES		7,753	93%	602	7%	8,355

* This data represents voting precincts with black populations of 90% or more within Jackson, MS.

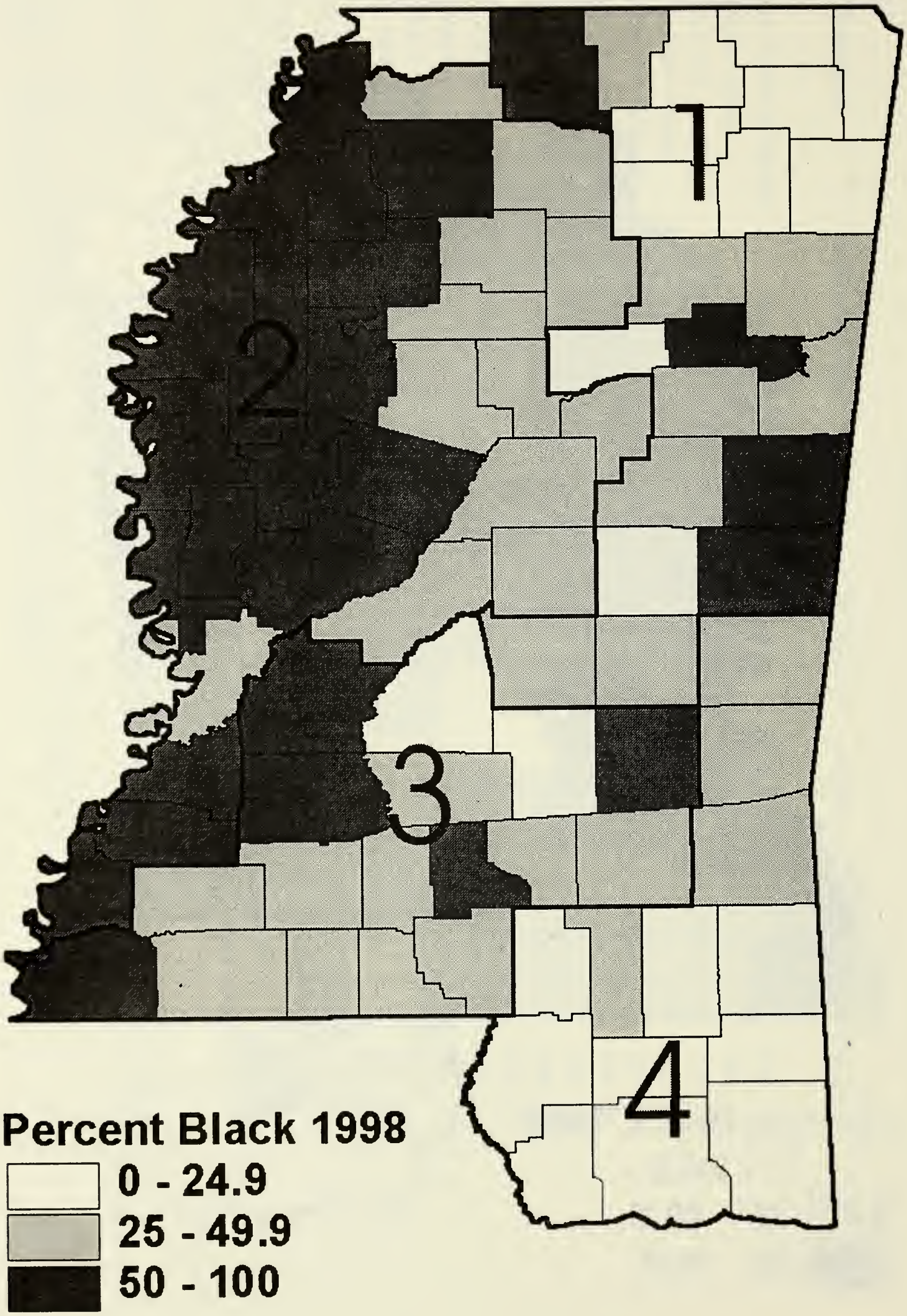
** Kevin Antoine, a black man, was the Democratic nominee for U.S. Congress.

*** Mike Parker, a white incumbent, was the Republican nominee.

APPENDIX C


1
2
3
4
Percent Black 1998
0 - 24.9
25 - 49.9
50 - 100

APPENDIX D


1
2
3
4
Percent Black 1998
0 - 24.9
25 - 49.9
50 - 100

CONTRIBUTORY NEGLIGENCE IN MEDICAL MALPRACTICE: RECENT APPLICATION IN THE CONTEXT OF THE SUICIDAL PATIENT

Failure to protect a suicidal patient from self-inflicted harm is one of the major causes of malpractice actions against psychiatrists and mental health providers.[1] The physician acts in a setting where accurately predicting a particular patient's propensity to commit suicide may be impossible even where the patient is receiving optimal treatment.[2] In such cases, courts have often struggled to determine under what circumstances, and to what extent, mentally ill patients may be held to a duty of self-care.[3]

This comment will examine the application of the contributory negligence doctrine to medical malpractice cases involving patient suicide. In Section I, traditional theories of contributory negligence in the medical malpractice context will be examined to determine themes applicable to the mental health field. In Section II, the duty of self-care of suicidal plaintiffs both in the custodial setting and during outpatient treatment will be analyzed in the light of recent court decisions. Section III will suggest a framework for analysis of the applicability of contributory negligence in cases where a patient commits suicide while under medical treatment.

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[1] Charles J. Williams, *Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care*, 76 NEB. L. REV. 301, 302 (1997). In the United States, more people commit suicide every year than die as a result of homicide. *Id.*

[2] Accurate prediction of suicide is often difficult, and the physician faces liability if she uses either insufficient or excessive means to prevent suicide. Phyllis Coleman & Ronald A. Shellow, *Suicide: Unpredictable and Unavoidable-Proposed Guidelines Provide Rational Test for Physician's Liability*, 71 NEB. L. REV. 643, 644-45 (1992). Because even accepted predictors of suicidal behavior have a significant error rate the most attentive and prudent physician may not be able to prevent a self-destructive act in a particular patient. *Id.* Since the death of a patient is undeniable evidence that the patient was suicidal many courts will hold the doctor liable for failure to predict the harm. *Id.*

[3] Commentators have argued that while some suicidal patients could be held accountable for their actions, greater liability should logically apply to a mental health professional who assumed the duty to treat the patient. Lisa A. Mecklenburg, Comment, *Negligence-Mental Health: Why Is It My Fault When I'm the One Who's Dead? North Dakota Comparative Fault in a Suicide Victim/Caregiver Context*, 71 N.D. L. REV. 1105, 1122-23 (1995).

I. GENERAL APPLICABILITY OF CONTRIBUTORY NEGLIENCE IN MEDICAL MALPRACTICE

Traditionally, the contributory negligence defense has been of limited usefulness in the context of medical malpractice claims.[4] Because medical treatment is an ongoing process difficulties may arise in assessing when an injury is sustained, leading to problems in determining if the patient's failure to exercise self-care is a proximate cause of his harm.[5] Further, courts have expressed concern that allowing contributory negligence to be improperly considered in the medical context could diminish the exercise of the special duty of care owed by physicians.[6]

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[4] Sharon W. Murphy, Comment, *Contributory Negligence in Medical Malpractice: Are the Standards Changing To Reflect Society's Growing Health Care Consumerism?*, 17 U. DAYTON L. REV. 151, 152 (1991). The control implicit in the physician-patient relationship along with the superior expertise imputed to the physician has resulted in difficulty in assigning fault for the negligent conduct of a patient. *Id.*

In the medical context, the patient has a "duty to use such care as a person of ordinary prudence would ordinarily use in circumstances like his own, and that if he fails to do this he cannot hold the physician answerable for the consequences of his own want of ordinary care." 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 302 (1981). While a patient's contributory negligence can operate as a complete bar to recovery, states that apply comparative negligence allow a determination of the extent of the plaintiff's fault to diminish his recovery. Thus, comparative negligence simply modifies contributory negligence. Madelynn R. Orr, Comment, *Defense of Patient's Contribution to Fault in Medical Malpractice Actions*, 25 CREIGHTON L. REV. 665, 670-71 (1992).

[5] Orr, *supra* note 4, at 669-70. Most cases that succeed with a contributory negligence defense in medical malpractice are actually examples of efficient intervening cause or failure to avoid consequences. *Id.* Medical malpractice cases typically revolve around actions that take place over time, making the delineation of a complex series of events essential to determine the patient's fault and proximate causation of injury. *Id.* at 676.

[6] Cowan v. Doering, 545 A.2d 159, 167 (N.J. 1988). Improper use of the con-

Analysis of patient negligence has focused both on the nature of the act or omission and on the temporal relationship of the negligence of physician and patient.[7]

A. Temporal Relationship of Physician and Patient Negligence

Where a physician committed a negligent act, traditional analysis required that a patient's negligence occurred concurrently in order to be considered contributory negligence.[8] Concurrent negligence that is a proximate cause of harm is rare in medicine since the patient is usually "inactive" at the time of treatment.[9] In an unusual example, *Champs v. Stone*,[10] a patient who allowed a grossly intoxicated physician to administer an injection could not recover for injury to his arm because a reasonable, prudent person would have refused treatment in exercising "ordinary care" for his own safety.[11]

In contrast, a patient's negligent act occurring prior to a physician's negligence would not absolve the physician of liability.[12] The physician must take the patient as she finds her

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tributory negligence defense could "indirectly lessen responsibility for wrongful conduct and defeat the goals of tort law." *Cowan*, 545 A.2d at 167. The concern is particularly critical in the health care setting regarding the duty to protect the mentally ill from "self-inflicted harm." *Id. See* Martineau v. Nelson, 247 N.W.2d 409, 416 n.15 (Minn. 1976) (stating that parents told of inadequate tubal ligation results should not have to make "moral and ethical choices . . . under a cloud of contributory fault").

[7] Orr, *supra* note 4, at 699. Each case will revolve around its unique factual structure and the "sequence of events is crucial" to the outcome. *Id.*

[8] Murphy, *supra* note 4, at 165. Courts traditionally applied the requirement of concurrent negligence strictly with the result that the defense of contributory negligence could rarely be used, and the patient's contribution to harm was considered only in mitigation of damages. *Id.* at 165-66.

[9] *Id.* Courts generally required a "clear finding" that the patient's negligent act was simultaneous with the act of the physician. *Id.*

[10] 58 N.E.2d 803 (Ohio Ct. App. 1944).

[11] *Champs*, 58 N.E.2d at 804-05. The plaintiff, who found himself obliged to undergo a series of injections prior to his marriage, was aware of the physician's drunken condition and allowed the injection after an initial protest. *Id.* at 804. Affirming a directed verdict for the defendant, the appellate court stated that a reasonable person who was aware of the doctor's condition would have refused treatment and left the office "at once." *Id.* at 805.

[12] Orr, *supra* note 4, at 698. Even if a patient's conduct prior to seeking

and cannot charge the patient with negligence in creating her own disability.[13] Thus, in *Ostrowski v. Azzara*,[14] a diabetic patient whose smoking contributed to her vascular disease was improperly barred from recovery for injury to her foot when the trial judge allowed consideration of her preoperative conduct in apportioning fault.[15] The court allowed only consideration of patient conduct that worsened her condition after the physician's act.[16]

Actions taken by the patient subsequent to alleged physician negligence often pose complex questions of causation and require meticulous temporal analysis.[17] Many courts have held that such actions are not a bar to recovery but can serve to mitigate damages under an "avoidance of the consequences"

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treatment is "self-destructive," a physician's subsequent negligence may eliminate the chance of the patient's future well-being. *Id.*

[13] Murphy, *supra* note 4, at 165. Under the doctrine of the "particularly susceptible victim" the patient could not be held accountable for injury that occurred after she sought medical care for her condition. *Id.*

[14] 545 A.2d 148 (N.J. 1988).

[15] *Ostrowski*, 545 A.2d at 155. Reversing the trial court, the Supreme Court of New Jersey noted that the patient's preexisting habits and condition were not a bar to recovery as the doctor was obliged to take her patient as she found her. *Id.* at 152. In this regard, the court observed that providers of health care have a "special responsibility" in assuming treatment of ailing persons. *Id.* at 155-56. *See* Jensen v. Archbishop Bergan Mercy Hosp., 459 N.W.2d 178, 187 (Neb. 1990) (holding contributory negligence inapplicable where patient's obesity predisposed him to pulmonary embolus for which he sought medical care).

[16] The New Jersey Supreme Court held that the avoidance of the consequences doctrine applied when the plaintiff's negligent acts took place after the tortfeasor's wrong. *Ostrowski*, 545 A.2d at 151-52. While the injured party does not have a duty to mitigate, public policy against waste of resources dictates that he not recover for the increased damages that could "reasonably have been averted." *Id.* at 152, 154. The distinction between avoidable consequences, applied to assess damages and comparative negligence, applied to assess fault is particularly critical where inappropriate use of comparative negligence will result in a complete bar to recovery. *Id.* at 154. The result in New Jersey, which bars recovery in comparative negligence where a plaintiff is greater than 50% at fault, is to allow allocation of damages under the avoidance of the consequences doctrine. *Id.* at 156. The physician bears the burden of proving the portion of the damages that the patient could have averted. *Id.* at 157.

[17] Orr, *supra* note 4, at 699. In addition, most courts required the doctor to prove that the patient had an adequate awareness of his medical condition. Murphy, *supra* note 4, at 169-70.

doctrine.[18] In some contexts, however, courts have held that a subsequent patient act can constitute the proximate cause of his harm and thus trigger the application of contributory negligence.[19]

B. *Actions of Patient That May Constitute Contributory Negligence*

Typically, three situations may give rise to a successful defense of contributory negligence: (1) a patient's refusal to follow a physician's instructions, (2) a patient's failure to return for followup, and (3) a patient's failure to convey accurate information to the physician.[20]

In *McGill v. French*,[21] the court upheld a finding of contributory negligence where there was sufficient evidence for a jury to find that a patient's failure to keep appointments after a diagnosis of prostate cancer and his failure to follow instructions to notify doctors of symptoms had a "causal connection" to the subsequent spread of disease.[22] Noting that expert witnesses for both the plaintiff and defendant admitted that a patient had an "active responsibility for his own well-being," the court stated that as a patient, the plaintiff "effectively denied" his physicians the opportunity to treat his condition.[23]

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[18] Murphy, *supra* note 4, at 162-63. Since the plaintiff's acts are not a proximate cause of his harm he may recover to the extent that his own acts did not aggravate the damages under the "avoidance of the consequences" doctrine. *Id.*

Thus, where physicians were negligent in failing to diagnose a spinal fracture, the patient was nonetheless under a duty to follow instructions after the fracture was discovered. Brazil v. United States, 484 F. Supp. 986, 990-91 (D. Ala. 1979). The court found that the patient's subsequent disregard of instructions to limit movement contributed to his paralysis and held that his actions could be considered in allocation of damages. *Brazil*, 484 F. Supp. at 992. *See* Bird v. Pritchard, 291 N.E.2d 769, 771-72 (Ohio Ct. App. 1973) (holding aggravation of injury by plaintiff subsequent to physician's negligent failure to diagnose nerve injury related to damages only).

[19] Orr, *supra* note 4, at 669. The three elements of determining proximate cause are (1) the harm would not have occurred "but for" the negligence of the actor, (2) the harm complained of was the "probable and natural result" of the negligence, and (3) there were no efficient intervening or superseding causes. *Id.* at 674. In the medical malpractice context, the patient's preexisting condition and conduct, though it could be a cause in fact of the resultant harm, is not considered a proximate cause of injury where a physician's subsequent negligence is proven. *Id.* at 687.

[20] *Id.* at 678-86.

[21] 424 S.E.2d 108 (N.C. 1993).

[22] *McGill*, 424 S.E.2d at 114-15. The patient also failed to inform his physi-

Failing to return for a timely follow-up has been considered contributory negligence where the patient was aware of the importance of continuing evaluation.[24] Thus, in *Chudson v. Ratra*,[25] a well informed patient who failed to return for a follow-up of an enlarging breast mass could not recover for her ultimate metastatic disease.[26] In cases involving a claim of failure to diagnose, a plaintiff's claim that her physician's negligence caused a "loss of chance" will allow that timing of the loss to be central to a contributory negligence defense.[27] In holding that the issue was correctly framed as contributory negligence, the court stated that concurrence of the patient's action was not critical where the plaintiff's negligence substantially contributed to her harm.[28]

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cians of onset of weight loss and weakness as he was instructed to do. *Id. See* Grippe v. Momtazee, 705 S.W.2d 551, 555 (Mo. Ct. App. 1986) (holding patient's delay in obtaining recommended surgical consultation to be proximate cause of inoperable cancer status at diagnosis).

[23] *McGill*, 424 S.E.2d at 115. *See* Moodie v. Santoni, 441 A.2d 323, 327 (Md. 1982) (holding jury question as to whether contributory negligence existed where patient disregarded instructions to report symptoms of hepatitis while taking anti-tuberculosis drug Isoniazid).

[24] Orr, *supra* note 4, at 695-96. Conversely, where a physician does not inform the patient of the significance of follow-up care, the patient may not be deemed to have acted unreasonably in failing to return. *Id.*

[25] 548 A.2d 172 (Md. Ct. Spec. App. 1988).

[26] *Chudson*, 548 A.2d at 183. The patient, who performed monthly self examinations, noted the enlargement of her breast mass for seven months while under instructions from her physician to call in the event of any change. *Id.* at 175.

[27] *Id.* at 176.

[28] *Id.* at 182-83. The court rejected the argument that contributory negligence could not be considered because the patient's actions took place subsequent to the physician's alleged negligence in failing to diagnose cancer in the face of a normal mammogram. *Id.* at 181-82. The court noted that because the injury—the metastasis of the cancer—had not occurred at the time of the defendant's alleged negligence the plaintiff's negligent act contributed to the "actual creation" of the harm. *Id.* at 182-83. *But see* Lambert v. Shearer, 616 N.E.2d 965, 976-77 (Ohio Ct. App. 1992) (stating that patient's negligence must be concurrent with physician's malpractice to decrease damage recovery).

Authorities agree that the patient has a duty to convey accurate information to his physician and that failure to do so may preclude his recovery for resultant injury.[29] Patients may negligently fail to impart an accurate history, or deliberately convey misinformation in order to obtain desired treatment.

In *Rochester v. Katalan*,[30] the plaintiff's decedent came to the emergency room, falsely claimed to be a heroin addict in withdrawal, and requested methadone.[31] Rochester, who had in fact consumed malt liquor and Librium, died of multiple drug intoxication after receiving two doses of methadone.[32] The court held that Rochester's negligence in, first, causing the methadone to be administered and, second, not informing the doctors of his deception after the fact "contributed directly to his own death" and was thus a bar to recovery.[33]

In *Mackey v. Greenview Hospital*,[34] a patient who failed to reveal that she was taking medications for a cardiovascular condition prior to a breast biopsy suffered irreversible brain

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In a rare Mississippi case dealing with comparative negligence in the medical malpractice context, the Mississippi Supreme Court stated that the patient's negligence could be considered by the jury where a patient had been "neglectful of her own physical condition." Reikes v. Martin, 471 So. 2d 385, 388-89 (Miss. 1985). The plaintiff, who sustained severe skin ulcers following cobalt radiation therapy, failed to follow-up with her physicians as instructed. *Reikes*, 471 So.2d at 388-99. Under the facts, the court held it was reversible error for the trial court to instruct the jury that they could not attribute negligence to the plaintiff. *Id.*

[29] *See* Haynes v. Hoffman, 296 S.E.2d 216, 217-18 (Ga. Ct. App. 1982) (holding that it is appropriate to consider contributory negligence where patient, upon inquiry, failed to disclose allergic history and suffered severe allergic reaction to drug subsequently administered); Ooft v. City of New York, 429 N.Y.S.2d 376, 377 (N.Y. Sup. Ct. 1980) (holding jury could consider contributory negligence where plaintiff failed to inform physicians of presence of more than one intrauterine device).

[30] 320 A.2d 704 (Del. 1974).

[31] *Rochester*, 320 A.2d at 706. Rochester and a companion who was a heroin addict were in police custody at the time. *Id.* He portrayed withdrawal symptoms convincingly and continued to beg for methadone after an initial dose. *Id.*

[32] *Id.* at 706-07.

[33] *Id.* at 708-09. The court noted that the patient's actions were actually intentional and stated that wilfully deceiving one's treating physician was a breach of the duty of self-care. *Id.*

[34] 587 S.W.2d 249 (Ky. Ct. App. 1979).

damage as a result of cardiac complications during the procedure.[35] The court affirmed the trial court's decision to allow the jury to consider the patient's negligence.[36] The court noted that while the physician bore the responsibility of obtaining a complete history, the patient had the duty to exercise ordinary care in conveying the information to her doctor.[37] However, the court stated that negligence in failure to give an accurate history will not be a bar to recovery where medical personnel were negligent in taking the history or failed to inform the patient of the importance of response.[38]

II. CONTRIBUTORY NEGLIGENCE IN THE SUICIDAL PATIENT

When a patient under the care of a physician commits suicide, the question of whether the negligence of either party was the cause of the death can pose difficult issues pertaining to scope of duty and proximate cause.[39] Courts generally

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[35] *Mackey*, 587 S.W.2d at 252-53.

[36] *Id.* at 257.

[37] *Id.* at 255. When the provider is negligent in obtaining the history, the patient can also be negligent if a reasonably prudent person in her circumstances would know that the information was inaccurate or incomplete as to a condition which could pose a danger to her. *Id.* at 255-56. However, the provider has the duty of asking appropriate questions and advising the patient of the importance of responding to the inquiry. 70 C.J.S. *Physicians and Surgeons* § 80 (1987). The patient is not under a "generalized duty to volunteer information." *Id.*

In a similar case, a patient who told a physician she took Nembutal but did not inform him that she was a barbiturate addict was found not contributorily negligent when he failed to treat her addiction. O'Neil v. State, 323 N.Y.S.2d 56, 61 (N.Y. Ct. Cl. 1971). The court reasoned that persons seeking medical care are not required to diagnose their own conditions. *O'Neil*, 323 N.Y.S.2d at 61.

[38] *Mackey*, 587 S.W.2d at 256. Where a patient responded to the wrong name and underwent a surgical procedure intended for another patient, the hospital was under an absolute duty to examine his name tag and establish his identity with certainty. *Id.* (citing Southeastern Ky. Baptist Hosp. v. Bruce, 539 S.W.2d 286 (Ky. 1976)). *See* Favalora v. Aetna Cas. & Sur. Co., 144 So. 2d 544 (La. Ct. App. 1962) (holding patient not under duty to repeat information to multiple personnel in hospital while undergoing variety of procedures).

[39] Williams, *supra* note 1, at 303-04. Because a claim that a caregiver should have prevented suicidal acts involves a nonfeasance tort the plaintiff must prove that the defendant was under a special duty to care for the plaintiff and that the injury to the plaintiff was foreseeable. *Id.*

The United States Court of Appeals for the Fourth Circuit, applying Mary-make a distinction between inpatient and outpatient situations in determining whether to allow a defense of contributory negligence.

A. *Assumption of a Suicidal Patient's Duty of Self-Care May Occur in the Custodial Setting*

The reluctance to allow the defense of contributory negligence in suicide cases particularly applies to situations where the patient is hospitalized or in police custody.[40] The key issue is whether a provider has assumed the duty to prevent the patient's act of self-destruction.[41]

The New Jersey Supreme Court refused to consider the defense of contributory negligence in *Cowan v. Doering*.[42] Hospitalized after a Nembutal overdose, Mrs. Cowan sustained severe back injuries when she exited an ICU window

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land law, examined the scope of duty owed to an outpatient who hanged himself while receiving treatment for depression. Farwell v. Un, 902 F.2d 282, 289-90 (4th Cir. 1990). The court held that where a competent patient agreed to voluntary hospitalization and state law precluded involuntary commitment of such a patient, the duty of care was to make "responsible inquiries" to determine patient status and intent. *Farwell*, 902 F.2d at 289. In such a situation, the court declined to hold his physicians to a duty of "continuous surveillance." *Id.* at 290. *See* Stepakoff v. Kantar, 473 N.E.2d 1131, 1135 (Mass. 1985) (holding psychiatrist did not owe special duty to safeguard patient from self-inflicted harm above duty to treat patient under standard of care of average member of profession practicing psychiatry).

[40] Williams, *supra* note 1, at 305-06. To hold a custodial patient responsible where the defendant has knowledge of suicidal propensities will not discourage unreasonable conduct by hospitals and other institutions. *Id.* at 305-07.

[41] *Id.* at 318. The commentator states that where a defendant has knowledge of the patient's suicidal propensity and exercises custody of the patient, he will have assumed the patient's duty of self care, and a suicidal act cannot constitute an intervening cause. *Id.* Correspondingly, where the provider has assumed the duty of self-care for the patient, the patient's capacity becomes "irrelevant." *Id.* at 315. *See* Rogers v. Baptist Gen. Convention, 651 P.2d 672, 676 (Okla. 1982) (stating hospitals owe standard of care based on individual patient's mental and physical status). However, a hospital is not the insurer of a patient's safety. *See also* Macon-Bibb County Hosp. Auth. v. Appleton, 181 S.E.2d 522, 525-26 (Ga. Ct. App. 1971) (holding hospital not liable where patient who was being watched every 15 minutes unlocked restraining window screen with Bic pen and fell five stories in escape attempt).

[42] 545 A.2d 159 (N.J. 1988).

and dropped twelve feet to the ground.[43] The trial court held that, as a matter of law, the plaintiff's act could not be considered contributory negligence because her tendency toward self-damaging behavior was a symptom of the illness for which the defendants were treating her.[44] The appellate court affirmed.[45]

In affirming the appellate court, the New Jersey Supreme Court held that the patient's duty of self-care was "subsumed" by the duty of the defendants to prevent harm, thus rendering a contributory negligence defense unavailable.[46] In dicta, the court recognized the use of a capacity-based standard for determining contributory negligence in "mentally disturbed plaintiffs."[47] The issue of a patient's capacity to adhere to the

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[43] *Cowan*, 545 A.2d at 161. Mrs. Cowan sued her treating physician, alleging he was negligent in not instituting suicide precautions, and Doering, her physician lover, for negligently prescribing Nembutal with the knowledge that she had attempted suicide with the same medication two months previously. *Id.* at 160.

[44] *Id.* at 162. The jury found the defendants liable, apportioning 50% blame to Doering and the remainder to the hospital, doctor and nurses. *Id.*

[45] *Id.* The appellate court agreed that the "plaintiff committed the very act that defendants were under a duty to prevent." *Id.*

[46] *Id.* at 163. A defendant's "duty of care may itself encompass a plaintiff's failure to exercise appropriate self-care." *Id. See* Winger v. Franciscan Med. Ctr., 701 N.E.2d 813, 820 (Ill. App. Ct. 1998) (holding that where suicidal patient is admitted to health care facility, providers "assume the duty of the patient's self-care"); Bramlette v. Charter-Medical-Columbia, 393 S.E.2d 914, 917 (S.C. 1990) (holding where institution accepts care of known suicidal patient, institution has duty to prevent suicidal act, and such act cannot constitute contributory negligence). *But see* Sheidt v. Denney, 644 So. 2d 813, 816 (La. Ct. App. 1994) (rejecting argument that comparative negligence of victim could not be considered where duty to prevent suicide existed).

[47] *Cowan*, 545 A.2d at 163. The court compared the standard favorably with the traditional standard for minor plaintiffs, whose conduct is judged in view of the "capacity to exercise care under all the circumstances." *Id.* A capacity-based standard allows the use of a "flexible" standard of care to hold a mentally disturbed plaintiff responsible only for conduct "unreasonable in the light of [her] capacity." *Id.*

Similarly, a mentally ill inpatient who sustained injuries in an escape attempt was liable only to the extent he was capable of exercising care for his own safety. Mochen v. State, 352 N.Y.S.2d 290, 295 (N.Y. App. Div. 1974). The court in *Mochen* stated that a person so injured should recover "regardless of objective notions of care not related in any way to his . . . ability to avoid fault." *Mochen*, 352 N.Y.S.2d at 294. In all but the most obvious cases, the court noted that the reasonable person's duty to avoid harm to herself was irrelevant where the hospital and physicians had assumed that duty by treating her for a suicide attempt.[48] Thus, the court determined that the controlling issues were the extent of the health care providers' duty to prevent such injury and whether the physician and staff should reasonably have anticipated the possibility of self-inflicted harm.[49]

In *Hunt v. King County*,[50] the court examined the issue of the scope of a hospital's duty to mentally unstable patients.[51] A psychotically depressed patient was injured when he jumped five stories from the window of an unlocked utility room in a psychiatric ward.[52] Upholding a jury verdict for the plaintiff, the court rejected the hospital's assertion that the plaintiff's action constituted contributory negligence or that alternatively it was by its intentional nature an intervening cause.[53] Explaining the broad scope of the hospital's duty, the court described the plaintiff's mental condition as the "opera-

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effect of mental illness on the capacity of the plaintiff will be a question of fact. *Id.* at 295.

[48] *Cowan*, 545 A.2d at 162-63.

[49] *Id.* at 164. The court held that the trial court properly instructed the jury to decide if her conduct was an intervening cause which could relieve the defendants of liability for failure to institute suicide precautions. *Id.* at 166. The issue of the foreseeability of her jump was a jury question. *Id.* The dissent noted that there was an issue of fact as to whether this was a suicide attempt or simply an unorthodox attempt to leave the premises. *Id.* at 167-68 (Clifford, J., dissenting).

Similarly, although the death by hanging of a hospitalized psychiatric patient was an intentional act, it was reasonably foreseeable and the defendants were under a "special duty" to prevent it. *See Winger*, 701 N.E.2d at 820. *But see* Smith v. King, 615 So. 2d 69, 73 (Ala. 1993) (stating in dicta that in-patient suicide while in seclusion with full suicide precautions not reasonably foreseeable). Commentators have noted that the issue of assumption of a suicidal patient's duty of self care leads to "confusing analysis and conflicting results." Williams, *supra* note 1, at 303.

[50] 481 P.2d 593 (Wash. Ct. App. 1971).

[51] *Hunt*, 481 P.2d at 597-99.

[52] *Id.* at 596-97. The patient was admitted for treatment of acute schizophrenic reaction. *Id.* at 596. Although the windows in the patient's room were screened, he was allowed full access to the ward, which included the unlocked utility room. *Id.* Following the fall, the patient vigorously resisted efforts to help him and was then treated as "actively suicidal." *Id.* at 597.

[53] *Id.* at 598-600.

tive fact . . . the known existence of which creates a duty to safeguard the patient from the foreseeable consequences of its existence."[54] The court reasoned that where a hospital exercised custodial control over the psychiatric patient, its scope of duty extended to the prevention of self-destructive acts that were reasonably foreseeable, whether those acts were intentional or negligent.[55] The court further stated that in considering a plaintiff's negligence in this context, his capacity to exercise the care of a reasonable person in assessing the risk of harm and acting reasonably on that risk must be evaluated.[56]

B. The Duty of Self-Care in the Outpatient Setting

While courts have held that the duty of self-care of hospitalized patients was encompassed by the providers' duty to treat the mental illness and prevent self-inflicted harm, patients not under the direct control of their physicians have been found to be contributorily negligent in committing suicide.[57] Many jurisdictions allow the defense, but disagree on the standard of conduct to which a mentally disturbed plaintiff should be held.[58]

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[54] *Id.* at 599.

[55] *Id.* at 598. The assumption of such a duty "absolves" the patient from the exercise of the duty of self-care. *Id.*

[56] *Id.* at 600. The question of capacity was for the jury, as was the foreseeability of the self-inflicted injury that fell within the scope of the hospital's duty to prevent. *Id.*

Where a suicidal patient hanged himself with the strap of his luggage while in protective seclusion, the Minnesota Supreme Court refused to allow the hospital to allocate fault to the patient. Tomfohr v. Mayo Found., 450 N.W.2d 121, 125 (Minn. 1990). The court held that when there is a known illness that decreases the patient's ability to prevent self-inflicted harm, the harm is foreseeable, and the scope of the caregiver's duty is enlarged to encompass preventing the harm. *Tomfohr*, 450 N.W.2d at 124. The court stated that its holding did not reject a capacity-based fault allocation in cases where such a duty was not placed on the caregiver. *Id.* at 125. *See* Weatherly v. State, 441 N.Y.S.2d 319, 322 (N.Y. Ct. Cl. 1981) (holding that mental state of acutely psychotic patient who jumped from hospital window precluded consideration of contributory negligence).

[57] Williams, *supra* note 1, at 309. Where a caregiver does not exercise "custody and control" over his patient, courts have allowed consideration of the suicide victim's own negligence. *Id.* The physician will still be held liable if it is determined that the standard of care for physicians in his specialty dictated that hospitalization was indicated for the patient's protection. Coleman & Shellow, *supra*

The issue of a psychiatric patient's duty of self-care was recently examined in *Hobart v. Shin*,[59] in which a campus physician for the University of Illinois was alleged to have negligently caused a student's death by suicide.[60]

Dr. Shin had insisted upon twenty-seven-year-old Kathryn's hospitalization for depression in late November of 1988.[61] Ten days after her discharge she returned "smiling and upbeat," and he complied with her request to prescribe her antidepressant, Doxepin, in larger amounts for her convenience.[62] Kathryn continued to do well and was seen for three

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note 2, at 655.

[58] Traditionally, courts have held mentally ill defendants to the same objective standard of care required of the ordinary person. *See* Stephanie I. Splane, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983). However, some courts and commentators have advocated applying a subjective standard of care in assessing the applicability of contributory negligence to a mentally ill plaintiff. *Id.* at 153-54. In the general negligence context, allowing mentally ill plaintiffs to play a large part in their own injuries and still recover completely is to require the public to exercise greater care with regard to them often without notice of their disability. *Id.* at 169-70.

But see Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67 (1995) (arguing that de-institutionalization movement and subsequent outpouring of mentally ill onto streets mandates capacity-based standard). In language that is arguably dicta, the United States Supreme Court stated in regard to contributory negligence:

> "[T]he plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances. To an adult in full possession of his mental and physical powers, one standard may be applied; to a boy, particularly if he be of limited intelligence, another standard; and to an infant not *sui juris* and totally ignorant of danger, still another."

Baltimore & Potomac R.R. Co. v. Cumberland, 176 U.S. 232, 238-39 (1900) (holding appropriate award of damages to mentally retarded thirteen-year-old lamplighter injured crossing unfenced railroad tracks).

[59] 705 N.E.2d 907 (Ill. 1998).

[60] *Hobart*, 705 N.E.2d at 910.

[61] *Id.* at 909. The psychiatrist to whom he referred Kathryn did not think she was suicidal. *Id.* Dr. Shin, however, was aware that she had attempted suicide seven years previously and insisted on her hospitalization. *Id.*

[62] *Id.* at 910. Kathryn expressed hope for the future and discussed her plans

weekly subsequent visits with no stated suicidal thoughts.[63] In early January, however, her mother sensed a return of her depression and asked her to see her doctor.[64] Kathryn refused, and four days later she checked into a motel room under an assumed name and took a lethal dose of Doxepin.[65]

At trial, the jury found for the defendant after the court allowed the defense to raise contributory negligence as an affirmative defense.[66] The appellate court reversed, holding as a matter of law that when a mentally ill patient commits suicide, the defense of contributory negligence is "inappropriate" where her treating physician is accused of malpractice.[67]

The Supreme Court of Illinois reversed.[68] The court held that the duty of a person to take reasonable care for her own safety could apply to suicide cases.[69] To hold otherwise, the court stated, would require a physician to be an "absolute insurer of any patient exhibiting suicidal tendencies," which

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to become a teacher. *Id.* Dr. Shin prescribed one month's supply of her antidepressant with one refill. *Id.* At trial, expert witnesses for the defense stated that Dr. Shin's actions were reasonable under the circumstances. *Id.* at 911.

[63] *Id.*

[64] *Id.* Her depression returned when her backpack, containing important college materials, was stolen. *Id.*

[65] *Id.* at 911. Kathryn consumed 224 capsules, 11 times the lethal dose of Doxepin. *Id.*

[66] *Id.* at 909. In Illinois, a plaintiff who is more than 50% negligent is barred from recovery by statute. *Id.* at 910 (citing 735 ILL. COMP. STAT. 5/2-1116 (West 1994)).

[67] *Id.* at 910.

[68] *Id.* at 913.

[69] *Id.* at 911. The court refused to follow a previous decision in which the court stated that in a malpractice case involving suicide, the negligence of the deceased is "not likely ever to be an appropriate or relevant issue." *Id.* at 910 (quoting Peoples Bank of Bloomington v. Damera, 581 N.E.2d 426, 429 (Ill. App. Ct. 1991)). In *Damera*, the patient, who was hospitalized under suicide precautions for depression, requested discharge the day after his wife asked for a divorce. *Damera*, 581 N.E.2d at 427. His physician complied, prescribing a two-week supply of antidepressants with detailed instructions as to medication use. *Id.* The patient consumed the entire supply with a bottle of wine four hours after his discharge and died. *Id.* In holding the defense of contributory negligence inapplicable, the court looked at the nature of the illness for which the physician treated the patient. *Id.* at 429. The suicidal patient simply does not have the same goal as his physician and by the nature of his illness is working "at cross purposes" with his physician. *Id.*

would result in few physicians being willing to treat such patients.[70] The court rejected the plaintiff's argument that even if Kathryn's negligence was properly considered, it should have been considered under a reduced standard of self-care because of her mental illness.[71] Because the jury evaluated her conduct by the standard of a reasonable person in similar circumstances the court stated that her mental illness was sufficiently considered.[72]

The North Dakota Supreme Court also held a suicidal patient at fault under a comparative fault analysis in *Champagne v. United States*.[73] Ricky Champagne, an eighteen-year-old Native American, came under the care of Indian Health Services (IHS) after a suicide attempt.[74] He received no medical treatment, counseling, or psychiatric referral following his discharge from the hospital and shot himself to death three weeks later.[75] The court examined the issue of whether, in the face of negligence by the IHS, Ricky bore responsibility for his death.[76] The court rejected the IHS argument that no liability could be found for its negligent actions because the suicide was a superseding cause of the harm.[77] However, the court held that Ricky's fault was greater than that of the IHS and thus recovery was precluded.[78] Further, the court held that a mentally ill patient may only be held to a duty of self-care commensurate with his capacity.[79] The court stated that the "factual extent" of the patient's mental capacity was central to an analysis of fault.[80] Since Ricky was not incapacitated by his illness the court reasoned that allocation of fault was appropriate.[81]

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[70] *Hobart*, 705 N.E.2d at 911. The court stated that "[p]ublic policy cannot condone such a result." *Id.* Commentators have further speculated that holding the mentally ill to a reduced standard of self care would result in decreased housing and employment opportunities. Splane, *supra* note 58, at 170.

[71] *Hobart*, 705 N.E.2d at 912. The jury was instructed that Kathryn was to be held to the standard of care of "a reasonably careful person under circumstances shown by the evidence." *Id.*

[72] *Id.* at 913. The evidence tended to show that Kathryn was competent at the time of her death and thus the instruction was appropriate. *Id.* Chief Justice Freeman agreed that the defense was appropriately raised, but argued in favor of a capacity-based standard that reflected the care an ordinary person would exercise in "a similar condition." *Id.* (Freeman, C.J., concurring in part and dissenting in part). *See* Skar v. City of Lincoln, 599 F.3d 253, 260-61 (8th Cir. 1979) (holding it was jury question whether plaintiff was capable of giving accurate history and thus contributorily negligent); DeMartini v. Alexander Sanitarium, 13 Cal. Rptr. 564, 567 (Cal. Ct. App. 1961) (applying capacity-based standard, holding that unless "completely devoid of reason" contributory negligence of mentally ill person is question for jury).

[73] 513 N.W.2d 75 (N.D. 1994). The United States Circuit Court of Appeals for the Eighth Circuit certified questions of law to the North Dakota Supreme Court prior to rehearing. *Champagne*, 513 N.W.2d at 75.

[74] *Id.* at 77. After stabilization by a physician following an intentional drug overdose, he was transferred to a mental health unit where his chief contact was with a social service counselor. *Id.*

[75] *Id.* at 77-78. Concerned that her son had quit school and was giving his possessions away Ricky's mother contacted the counselor one week prior to his death. *Id.* at 77. Although the counselor told her not to worry, he subsequently

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called Ricky and made an appointment for him. *Id.* The counselor did not follow up when the young man missed the appointment. *Id.* Three days later, after writing a suicide note, Ricky died of a self-inflicted gunshot wound to the chest. *Id.* at 78. Expert testimony established that Ricky's behavior was classic for an impending suicide. *Id.* at 77.

[76] *Id.* The IHS failed to adhere to its own protocol for management of suicidal patients, and expert testimony established that the doctor's treatment fell below the accepted standard of care. *Id.*

[77] *Id.* at 81. The causal chain is not broken where the patient's suicide is a foreseeable result of the caregiver's negligence. *Id.*

The Supreme Court of Connecticut also refused to deem an outpatient's suicide an intervening cause sufficient to break the causal chain that began with the negligent prescription of antidepressants. Edwards v. Tardif, 692 A.2d 1266 (Conn. 1997). The court noted that the risk of suicide itself was the foreseeable risk that rendered the physician negligent in prescribing medication for a depressed patient without examination. *Edwards*, 692 A.2d at 1269-70.

[78] *Champagne,* 513 N.W.2d at 81. The North Dakota statute allowed recovery under a comparative fault analysis if the plaintiff's fault was "not as great as the combined fault" of all others whose fault led to the injury. *Id.* at 80. "Fault" under the statute included intentional acts as well as negligence and products liability. *Id.*

[79] *Id.* at 80. The court reasoned that the health care provider's duty became greater as the patient's capacity for self-care diminished. *Id.*

[80] *Id.* at 81. The court noted, however, that the federal district court did not make findings of fact as to Ricky's capacity. *Id.* Rather, the district court relied on the intent evidenced by the writing of the suicide note to find that Ricky was not incapacitated. *Id. See* Sandborg v. Blue Earth County, 601 N.W.2d 192, 197 (Minn. Ct. App. 1999) (holding evidence of inmate's capacity sufficient to allow jury to assess comparative negligence in suicide).

[81] *Champagne,* 513 N.W.2d at 80-81.

III. FRAMEWORK FOR ANALYSIS OF CONTRIBUTORY NEGLIGENCE OF A SUICIDE VICTIM

Where a suicidal patient is hospitalized, the defense of contributory negligence can rarely be utilized successfully.[82] By instituting custodial treatment of a patient known to harbor self-destructive tendencies, mental health professionals acknowledge the patient's inability to care for himself and assume a broad duty to prevent self-inflicted harm.[83] Further, the essential nature of a depressive mental illness accompanied by suicidal ideation renders the possibility of suicide eminently foreseeable.[84] In the custodial context, the question of the patient's capacity for self-care is irrelevant.[85]

In the context of outpatient suicide, however, courts may allow the consideration of contributory negligence in certain situations.[86] Application of traditional theories of contributory negligence in medical malpractice should begin the analysis in such a case. For example, a failure to inform one's physician of critical facts, such as the return of suicidal ideation, can "effectively deny" the caregiver a viable opportunity to treat an exacerbation of depressive illness.[87] A patient who willfully denies suicidal thoughts can similarly be negligent in failing to give his doctor information that he knows is crucial to his treatment.[88] Similarly, a patient who fails to follow instructions as to medication or who fails to return for follow-up evaluation may bear at least partial responsibility for the consequences of his actions.[89]

The issue of capacity is most likely to arise where suicide occurs during outpatient treatment. While some courts hold that the fault of a suicide victim must be assessed with a view to the harm that the particular patient could reasonably have avoided, application of such a capacity-based standard to all mentally disturbed plaintiffs could have far-reaching and untoward consequences.[90] Where a provider reasonably believes a patient is not suicidal and outpatient treatment is appropriate, the objective standard for the duty of self-care should apply. In the outpatient context, the patient should be expected to exercise the ordinary duty of self-care of a reasonable person under the circumstances to follow instructions and inform his physician of changes in his condition. Thus, in *Hobart*, the patient was correctly held responsible for her conduct after being deemed contributorily negligent using an objective standard of self-care.[91]

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[82] *See supra* notes 39-56 and accompanying text.

[83] *See supra* notes 39-56 and accompanying text. In this situation, a patient is as helpless to avert the consequences of his illness as a anesthetized patient is to assist in his own operation.

[84] *See supra* notes 55-56 and accompanying text.

[85] *See supra* notes 43, 54-55 and accompanying text.

[86] *See supra* notes 57-81 and accompanying text.

[87] *See supra* notes 34-38 and accompanying text. As in *Mackey*, a patient may be held to be negligent where she knows or should know that she is not conveying facts which may pose a danger to her.

[88] *See supra* notes 29-33 and accompanying text.

[89] *See supra* notes 20-27 and accompanying text.

The *Champagne* case, while superficially similar, illustrates the difficulty of application of a reduced standard of care.[92] A capacity-based standard is not only subjective to the actor but also to the trier of fact to determine what level of capacity renders the actor competent and thus culpable for his actions.

IV. CONCLUSION

While a patient seeking medical help for suicidal ideation must be assured that her provider will exercise reasonable care to protect her from self-inflicted harm while therapy progresses, public policy dictates that the law not require the mental health professional to be the absolute insurer of the patient's life. Where a patient's condition does not warrant hospitalization, she should be held to the objective standard of self-care and must exercise ordinary care for her own safety. A patient who fails to follow physician instructions, return for follow-up, or supply critical information should be held contributorily negligent for her resultant harm.

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[90] *See supra* notes 56, 78-79, and accompanying text.

[91] *See supra* notes 58-72 and accompanying text.

[92] *See supra* notes 73-76 and accompanying text. It is particularly difficult to determine the capacity of a patient when the negligence of the caregiver has resulted in lack of medical documentation. *See supra* notes 73-76 and accompanying text.

Susan O'Neal, M.D.

RECENT DECISIONS

STATUTORY INTERPRETATION—THE AMERICANS WITH DISABILITIES ACT OF 1990—QUALIFIED MENTALLY DISABLED PERSONS HAVE A RIGHT TO TREATMENT IN COMMUNITY-BASED SETTINGS

I. FACTS

In May 1992, L.C., a mentally retarded woman with schizophrenia, was voluntarily admitted to Georgia Regional Hospital ("GRH") and confined for psychiatric treatment.[1] Another mentally retarded woman with a personality disorder, E.W., was voluntarily admitted to GRH and confined for psychiatric treatment in February 1995.[2] Both women's conditions eventually stabilized such that medical professionals determined they could be treated in community-based programs.[3] However, both women remained institutionalized for some period after these determinations.[4]

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[1] Olmstead v. Zimring, 119 S. Ct. 2176, 2183 (1999).

[2] *Olmstead*, 119 S. Ct. at 2183. Both L.C. and E.W. have histories of institutionalization for psychiatric problems. *Id.*

[3] *Id.* L.C. was determined to be eligible for community-based treatment by May 1993. *Id.* E.W. was eligible for community-based treatment in 1996. *Id.*

[4] *Id.* L.C. was placed in community-based treatment in 1996 and E.W. in 1997. *Id.*

L.C. and E.W. brought suit against the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Department of the Fulton County Regional Board (collectively "the State") alleging violations of Title II of the Americans with Disabilities Act ("ADA").[5] The District Court for the Northern District of Georgia granted partial summary judgment for L.C. and E.W.[6] The Eleventh Circuit Court of Appeals held: Affirmed and remanded.[7] On appeal, the United States Supreme Court held: Affirmed in part, vacated in part and remanded.[8] The Court held Title II of the ADA requires states "to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."[9]

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[5] *Id.* at 2184. L.C. brought the original suit in May 1995, and E.W. later intervened in the suit. *Id.* Both women requested relief in the form of placement in community-based programs for treatment. *Id.* The pertinent sections of the ADA are sections 12131-12132. The section of the ADA at issue reads as follows: "Subject to the provision of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (1994).

[6] *Olmstead*, 119 S. Ct. at 2184. The court held the State had violated Title II of the ADA by not placing L.C. and E.W. in community-based treatment programs. *Id.* The court rejected the argument of the State that the failure to place L.C. and E.W. in a community-based program was based on lack of funding and not on discrimination by reason of their disabilities, stating "unnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be justified by a lack of funding." *Id.*

[7] *Id.* The Eleventh Circuit affirmed the district court's judgment but remanded for reconsideration of the State's cost-based defense. *Id.* The court found that the ADA did allow a cost-based defense and, because the district court did not consider the State's argument, remand was proper. Zimring v. Olmstead, 138 F.3d 893, 905 (11th Cir. 1998).

[8] *Olmstead*, 119 S. Ct. at 2190. The Court heard the case on writ of certiorari. *Id.* at 2184. The Court held the ruling of the Eleventh Circuit was "unduly restrictive." *Id.* at 2185.

[9] *Id.* at 2190. The Court held the court of appeals erred in restricting the

II. Related Law

A. *Reasonable Modifications*

In *Southeastern Community College v. Davis*,[10] the United States Supreme Court considered whether section 504 of the Rehabilitation Act of 1973 forbade educational institutions "from imposing physical qualifications for admission to their clinical training programs."[11] In *Southeastern Community College*, a licensed practical nurse with a severe hearing disability sued the college, alleging violations of section 504 of the Rehabilitation Act,[12] after being refused admission into the registered nursing program there.[13] The Court rejected Davis' claims stating, under section 504, educational institutions are not required to disregard an individual's disability nor substantially modify a program in order for the disabled person to participate.[14] The Court stated "neither the lan-

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State to a cost-based defense in that the other services the State provided to the mentally disabled must also be taken into account. *Id.* at 2185.

[10] 442 U.S. 397 (1979).

[11] *Southeastern Community College*, 442 U.S. at 400. In *Southeastern Community College*, the Court interpreted section 504 of the Rehabilitation Act for the first time. *Id.* at 405.

[12] *Id.* at 402. Section 504 of the Rehabilitation Act provides: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . " 29 U.S.C. § 794 (1994). Southeastern Community College received federal funds. *Southeastern Community College*, 442 U.S. at 400.

[13] Southeastern Community College, 442 U.S. at 400. In *Southeastern Community College*, respondent sought admission to Southeastern's Associate Degree Nursing program in order to be trained as a registered nurse. *Id.* However, upon learning respondent had a serious hearing disability, the school consulted the Executive Director of the North Carolina Board of Nursing. *Id.* at 401. The Director recommended respondent not be allowed into the nursing program because respondent could not practice safely as a nurse and would be unable to safely participate in the clinical training program without substantively changing the program. *Id.*

[14] *Id.* at 405. The Court stated under section 504 "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Id.* The Court interpreted "otherwise qualified" disabled persons to be those who could do what was required by a job in spite of their disability. *Id.* at 406. The Supreme Court later modified this holding. *See* School Bd.

guage, purpose, nor history of section 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds."[15]

B. Right to Meaningful Access

In *Alexander v. Choate*,[16] the Supreme Court introduced the concept of meaningful access to the analysis of alleged violations of section 504 of the Rehabilitation Act.[17] The Court held not all showings of a disparate impact on the disabled constitute a prima facie case under section 504.[18] In

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of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987) (stating "otherwise qualified" person is one who can perform essential functions of employment). *See also* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1113-16 (1995) (tracing Supreme Court's interpretation of section 504 of Rehabilitation Act).

[15] *Southeastern Community College*, 442 U.S. at 411. Davis argued section 504 required Southeastern to take the steps to modify its program that would make effective oral communication unnecessary. *Id.* at 407. Davis cited regulations of the Department of Health, Education, and Welfare that state postsecondary educational programs must make "modifications" to accommodate disabled persons. *Id.* at 409 (citing 45 C.F.R. § 84.44 (1978)). The Court responded the modifications that would be necessary to accommodate Davis would amount to "fundamental alterations" to the program. *Id.* at 410. The Court went on to hold if the Department of Health, Education, and Welfare were trying to require these steps, it lacked the authority to create such an obligation. *Id.* at 411-12. Regulations requiring such substantial changes would "constitute an unauthorized extension of the obligation imposed by [section 504]." *Id.* at 410. The Third Circuit later stated "[t]he test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program." *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994). *See* Sabo v. O'Brannon, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984) (holding patient has no affirmative right under section 504 to be placed in non-institutional setting for treatment). *Cf.* ADAPT v. Skinner, 881 F.2d 1184, 1193-94 (3d Cir. 1989) (holding disabled persons' right to access to transportation does not require mainstreaming into public transit as this would amount to fundamental alteration of program).

[16] 469 U.S. 287 (1985).

[17] *Alexander*, 469 U.S. at 301. Subsequent courts have differing definitions of what "meaningful access" entails. For a discussion of these, see Alexander Abbe, *"Meaningful Access" to Health Care and the Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act*, 147 U. PA. L. REV. 1161, 1183-93 (1999) (reviewing cases where courts have interpreted "meaningful access" after *Alexander v. Choate*).

[18] *Alexander*, 469 U.S. at 299. Respondents argued that any showing of dis-

Alexander, Tennessee Medicaid recipients brought a class action suit alleging a proposal to reduce the number of hospital days paid by Medicaid violated section 504 of the Rehabilitation Act.[19] The Court held that no showing of discriminatory intent was necessary to demonstrate a violation of section 504.[20] The Court went on to state not all showings of a disparate-impact would result in actionable discrimination.[21] Discussing *Southeastern Community College v. Davis*, the Court stated "the ultimate question is the extent to which [the State] is required to make reasonable modifications in its programs for the needs of the handicapped."[22] The Court held a

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parate impact upon the disabled was discriminatory. *Id.* at 290. The Court stated that some action which had "an unjustifiable disparate impact" on the disabled was reached by section 504. *Id.* at 299.

[19] *Id.* at 289. Tennessee proposed to reduce the number of days paid for by Medicaid from 20 days to 14 days. *Id.* Respondents argued a discriminatory effect on the disabled would result from this limitation. *Id.* Evidence showed that 27.4% of all disabled Medicaid recipients required more than 14 days of care as opposed to 7.8% of all non-disabled recipients. *Id.* at 290. Respondents also argued that any limitation on the days covered by Medicaid was discriminatory given the special needs of the disabled. *Id.*

[20] *Id.* at 297. The State urged that only intentional discrimination was forbidden by section 504. *Id.* at 292. (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983)). In *Guardians*, the Court considered whether both intentional and disparate-impact discrimination were prohibited by Title VI of the Civil Rights Act of 1964. *Guardians*, 463 U.S. at 582. The Court held Title VI only reached intentional discrimination. *Id.* at 607-08. However, the Court also held agencies could address unjustified disparate-impact actions. *Id.* at 584. The *Alexander* Court held that, under *Guardians*, regulations which had been promulgated under section 504 "could make actionable the disparate impact challenged in this case." *Alexander*, 469 U.S. at 294. The Court went on to cite legislative history that demonstrated Congress intended the Rehabilitation Act to reach more than intentional discrimination of the disabled. *Id.* at 294-97.

[21] *Alexander*, 469 U.S. at 298-99. The Court stated Congress had not intended for the Rehabilitation Act to require "Handicapped Impact Statements" before any state action could be taken which might affect the disabled so as to make the Rehabilitation Act "a National Environmental Policy Act for the handicapped." *Id.* *See* New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982) (stating proof of disparate treatment is not essential to establish claim under section 504 or its regulations).

[22] *Alexander*, 469 U.S. at 299 n.19. In *Alexander*, the Court somewhat broadened the interpretation of the Rehabilitation Act from its ruling in *Southeastern Community College*, lending greater support to disabled persons' struggle with discrimination. Weber, *supra* note 14, at 1113-15.

qualified disabled person must have "meaningful access" to the benefits offered by the State and, as such, "reasonable modifications" may be required by the State.[23]

C. *Right to Integrated Treatment*

In *Helen L. v. DiDario*,[24] the Third Circuit Court of Appeals addressed whether or not Title II of the ADA[25] required the State to treat the disabled in the "most integrated setting appropriate."[26] In *Helen L.*, nursing home residents brought an action against the Pennsylvania Department of Public Welfare for requiring them to receive care in a nursing home rather than through a home-based attendant care program.[27] Petitioner had been determined to be eligible for attendant care but remained in a nursing home due to a lack of funding.[28]

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[23] *Alexander*, 469 U.S. at 301. The Court qualified its holding that the Rehabilitation Act requires "meaningful access" by holding a state is not required to provide "adequate health care." *Id.* at 303. *See* United States v. Board of Trustees, 908 F.2d 740, 748 (11th Cir. 1990) (holding school must provide deaf students with sign language interpreters in order for student to have meaningful access to education); ADAPT v. Skinner, 881 F.2d 1184, 1194 (3d Cir. 1989) (holding disabled persons' right to access to transportation does not require mainstreaming into public transit as this would amount to fundamental alteration of program); *see also* Frances J. v. Bradley, No. 92C5190, 1992 WL 390875, at *7 (N.D. Ill. Dec. 15, 1992) (mem.) (holding unless program is absolutely exclusionary, plaintiffs have meaningful access). *Cf.* Lau v. Nichols, 414 U.S. 563, 568 (1974) (holding failure of school to provide non-English speaking students with instruction in English or to otherwise provide for students' instruction denies students access to benefits of education).

[24] 46 F.3d 325 (3d Cir. 1995).

[25] *Helen L.*, 46 F.3d at 328. Title II of the ADA extended the prohibitions against discrimination of the disabled established in section 504 of the Rehabilitation Act to programs run by state and local governments. Weber, *supra* note 14, at 1089. *See* Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996) (stating ADA enacted to extend protections of section 504 of Rehabilitation Act to services of "public entities" regardless of federal funds); Easley v. Snider, 36 F.3d 297, 300-01 (3d Cir. 1994) (holding enactment of ADA extended principle of non-discrimination established in Rehabilitation Act beyond institutions receiving federal funds).

[26] *Helen L.*, 46 F.3d at 328. The Third Circuit had previously considered whether confinement in an institution violated a patient's constitutional rights. *See* Clark v. Cohen, 794 F.2d 79, 87 (3d Cir. 1986) (holding continued confinement of plaintiff despite determination plaintiff could be treated in less restrictive setting violated substantive liberty right to appropriate treatment); *see also* Homeward Bound, Inc. v. Hissom Mem'l Ctr., No. 85-C-437-E, 1987 WL 27104, at *20 (N.D. Okla. July 24, 1987) (holding "[f]reedom from bodily restraint includes the right to be free from confinement in an institution" when unnecessary). However, other courts have held there is no federal right to be treated in the least restrictive environment. *Cf.* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 18 (1981) (holding no right to treatment in least restrictive setting); Lelsz v.

The court examined Title II of the ADA and relevant sections of the Code of Federal Regulations which had been enacted pursuant to Title II.[29] The Third Circuit held "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled."[30] The court stated the admission of petitioner into the

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Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987) (holding no constitutional right to treatment in least restrictive setting). *See generally* Dana M. Bessette, Note, *Reinterpreting the ADA: Finding a Freedom from Unnecessary Segregation*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 131 (1998) (discussing history of integration of disabled persons by law up to *Helen L. v. DiDario*).

[27] *Helen L.*, 46 F.3d at 327. The original plaintiff, Helen L., filed suit against the superintendent of the facility, Albert DiDario, asserting ADA and constitutional law claims. *Id.* at 328 n.3. Helen L. later dropped her ADA claims. *Id.* Beverly D. and Ilene F. joined Helen L.'s lawsuit and filed suit against the DPW. *Id.* Idell S., the petitioner, joined the lawsuit in 1994, alleging only ADA claims. *Id.* at 327-28. For a discussion of the ADA and its impact, see generally Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 DRAKE L. REV. 761 (1999). *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991) (discussing statutory and common law treatment of disabled throughout history).

[28] *Helen L.*, 46 F.3d at 329. Petitioner was a 43-year-old woman who had been partially paralyzed due to meningitis. *Id.* at 327. She was being cared for in a nursing home; however, although petitioner could not live independently, she was able to care for herself for a large part. *Id.* The DPW had two programs to treat physically disabled persons: Medicaid funding for nursing home care and an attendant care program. *Id.* at 328. The nursing home care cost approximately $45,000 per year, while attendant care cost approximately $10,500 per year. *Id.* at 329.

[29] *Id.* at 331-32. The ADA authorized and directed the Attorney General to promulgate regulations in order to implement Title II. *See* 42 U.S.C. § 12134 (1994). These regulations have the force of law. *Helen L.*, 46 F.3d at 332. The regulations are patterned after regulations promulgated under section 504 of the Rehabilitation Act. *Id.* at 331 (citing 42 U.S.C. § 12134(b) (1994)). The section of the C.F.R. alleged to have been violated states "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (1999).

[30] *Helen L.*, 46 F.3d at 333. The court cited the legislative history of the ADA

attendant care program did not require any fundamental alteration of the program itself or its admission requirements.[31]

In *Kathleen S. v. Department of Public Welfare*,[32] the District Court for the Eastern District of Pennsylvania addressed whether the State and its agencies were required by Title II of the ADA to provide the mentally disabled with treatment in community-based settings.[33] In *Kathleen S.*, mentally disabled residents of a state institution brought a class action

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as clearing up any ambiguities as to whether unnecessary segregation amounts to illegal discrimination. *Id.* at 333 n.15. *See* Crandon v. United States, 494 U.S. 152, 158 (1990) (holding where ambiguous courts should look beyond statutory language to purpose and intent of statute in interpretation). *See also* Hanson v. Clarke County, 867 F.2d 1115, 1120 (8th Cir. 1989) (rejecting plaintiff's claim to right to be placed in "the least restrictive environment consistent with qualified professional judgment"); Conner v. Branstad, 839 F. Supp. 1346, 1351-52 (S.D. Iowa 1993) (holding mentally and physically disabled have no constitutional right to be treated in least restrictive environment). In *Conner v. Branstad*, the court noted that the *Southeastern Community College* court held section 504 of the Rehabilitation Act placed no affirmative action duties upon a state. *Conner*, 839 F. Supp. at 1355-56 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). As such, the district court held the plaintiffs had no claim under section 504. *Id.* at 1356. The court went on to hold that because Title II of the ADA does not "mandate deinstitutionalization," plaintiffs had no claim under the ADA either. *Id.* at 1357.

[31] *Helen L.*, 46 F.3d at 337. The court rejected the DPW's argument that placing petitioner in an attendant care program would require a fundamental alteration of the program because of the manner of allocating funding from the state's legislative body. *Id.* DPW argued that the General Assembly had already allocated funding to the attendant care and nursing home programs for the fiscal year. *Id.* at 337. DPW stated it could not shift funds from one program to another without violating state constitutional law. *Id.* The court held DPW was violating Title II of the ADA and difficulties in funding could not justify this violation. *Id.* at 338. For a discussion of the effects of costs on states' duties to integrate the disabled see Lucille D. Wood, Note, *Costs and the Right to Community-Based Treatment*, 16 YALE L. & POL'Y REV. 501 (1998). Wood identifies three possible approaches to courts' considerations of the costs of integration of the disabled: the no-costs approach where the court does not consider cost, the efficiency approach that requires integration only where it is more cost-efficient than segregation, and the strict separation of powers approach in which a court leaves allocation of funds to state legislatures. *Id.* at 508-10. Wood analyzes *Helen L.* in light of these three approaches. *Id.* at 510-15.

[32] 10 F. Supp. 2d 460 (E.D. Pa. 1998).

[33] *Kathleen S*, 10 F. Supp. 2d at 462.

alleging the State had violated Title II of the ADA by its failure to treat plaintiffs in the most integrated setting possible after determining that plaintiffs could be treated in community-based settings.[34] The court held the plaintiffs were entitled to treatment in community-based programs under Title II of the ADA.[35] The court rejected the State's argument that immediate placement of plaintiffs in community-based treatment would require fundamental alterations in the State's administration of services for the mentally disabled because this placement was required by law.[36]

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[34] *Id.* at 462. The plaintiffs alleged violations of Title II of the ADA and 28 C.F.R. § 35.130(d). *Id.* The plaintiffs argued they were segregated unnecessarily by being confined in an institution when placement in a community-based setting would have been "the most integrated setting appropriate to their needs." *Id.* at 466.

There has been a shift away from treating the mentally disabled in institutional settings and toward treatment in the community. Stacy E. Seicshnaydre, *Community Mental Health Treatment for the Mentally Ill—When Does Less Restrictive Treatment Become a Right?*, 66 TUL. L. REV. 1971, 1971 (1992). William Christian states normalization in the form of integration of the mentally disabled into society guides the treatment of the mentally disabled. William Christian, Note, *Normalization As a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 431-40 (1994) (tracing treatment of mentally disabled persons under federal law and discussing states' duty to integrate mentally disabled under Title II of ADA). *See* Michael L. Perlin, Symposium, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH 15 (1993/1994) (discussing possible applications, effects of ADA for mentally disabled persons). For further discussion of the benefits of community-based treatment, see Alison Barnes, *The Policy and Politics of Community-Based Long-Term Care*, 19 NOVA L. REV. 487 (1995) (discussing benefits of community-based care as opposed to institutionalization).

[35] *Kathleen S.*, 10 F. Supp. 2d at 471-73. The court looked at Title II of the ADA and the ADA's "integration regulation," 28 C.F.R. § 35.130(d). *Id.* at 468. The court interpreted the ADA as mandating the end of segregation of the disabled. *Id. See* Charles Q. v. Houstoun, No. CIV.A.1:CV-95-280, 1996 WL 447549, at *6 (M.D. Pa. April 22, 1996) (following *Helen L. v. DiDario* in holding ADA requires person be treated in most integrated setting provided by state). *But see* Jackson v. Fort Stanton Hosp. and Training Sch., 964 F.2d 980, 992 (10th Cir. 1992) (noting "[c]ommunity placement is only one of various possible ways in which the state may comply with its constitutional obligations to adequately care for and train involuntarily committed individuals").

[36] *Kathleen S.*, 10 F. Supp. at 470-71. The court held "the planning and preparation of community services and facilities for eligible resident . . . does not require a 'fundamental alteration' of [the State's] services, programs or activities."

III. *OLMSTEAD V. ZIMRING*

A. *Opinion of the Court*

In *Olmstead v. Zimring*,[37] the United States Supreme Court held Title II of the Americans with Disabilities Act of 1990 requires states to treat mentally disabled persons in community settings rather than institutions when such treatment is determined to be adequate by the State's medical professionals and the disabled person does not oppose placement in a community setting, provided such placement can be "reasonably accommodated" by the State.[38] In its ruling, the Court noted, in passing the ADA, Congress specifically identified unjustified segregation of the mentally disabled as discrimination.[39] However, the Court noted that while the State has an obligation to modify its treatment programs in order to provide treatment in the most integrated setting, the "States could resist modifications that 'would fundamentally alter the nature of the service, program, or activity.'"[40]

Id. at 471. The court additionally found that "complying with the ADA's integration mandate does not require a fundamental alteration" because requiring the State to obey the law cannot be unreasonable. *Id.* (citing *Helen L. v. DiDario*, 46 F.3d at 338).

[37] 119 S. Ct. 2176 (1999).

[38] *Olmstead*, 119 S. Ct. at 2190.

[39] *Id.* at 2187. The State argued it had not violated Title II of the ADA because L.C. and E.W. were not discriminated against on the basis of their disability since their continued treatment in an institution was based on appropriation of funds. *Id.* at 1286. The State also argued that because L.C. and E.W. had identified no comparison class which had been given preferential treatment they had not identified any discrimination by the State. *Id.* The Court rejected these arguments by the State noting that "[t]he ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living." *Id.* The Court went on to observe Congress' recognition that isolation is a form of discrimination reflects the idea that institutional placement carries a stigma and that institutional confinement "severely diminishes" the quality of life enjoyed by a person. *Id.* at 2187.

[40] *Id.* at 2185 (citing 28 C.F.R. § 35.130(b)(7) (1998)). The Court noted that Congress intended the regulations passed under the ADA to be consistent with the regulations promulgated under section 504 of the Rehabilitation Act of 1973. *Id.* at 2190 n.16. The Supreme Court interpreted the "undue burden" standard applicable under the regulations passed in support of the Rehabilitation Act of 1973 as also being applicable in interpreting the regulations passed under the

The Court held that the court of appeals' interpretation of the fundamental alterations defense was "unduly restrictive"[41] in that the Eleventh Circuit allowed the State a cost-based defense only if the State could show that placing L.C. and E.W. in a community setting for treatment would be a fundamental alteration.[42] The Court stated, in order to determine if a modification would require a fundamental alteration, the district court should consider the "range of services" offered by the State to the mentally disabled and the "State's obligation to administer services with an even hand" in addition to the cost of providing community-based care to particular individuals.[43] The Court affirmed the Eleventh Circuit insofar as it held the mentally disabled have a right to treatment in the most integrated setting, but vacated and remanded for reconsideration of the State's cost-based defense in light of its opinion.[44]

B. Justice Stevens's Concurring Opinion

In his concurring opinion, Justice Stevens reasserted "unjustified disparate treatment" is a violation of Title II of the ADA.[45] Justice Stevens stated the district court erred

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ADA. *Id.*

[41] *Id.* at 2185. The Court held the Eleventh Circuit should not have restricted its evaluation of the State's fundamental alterations defense to the cost of supplying only the two litigants with community-based care. *Id.* at 2185.

[42] *Id.* at 2189. The Supreme Court noted that states would, for all practical purposes, lack any cost-based defense under the court of appeals' interpretation of the fundamental alterations regulation. *Id.* The Court stated "[i]f the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail." *Id.*

[43] *Id.* The Court stated if the State could demonstrate that, because of the allocation of resources "immediate relief for the plaintiffs would be inequitable," the State would have a justifiable fundamental alterations defense. *Id.* The fact that, on its face, community-based treatment is less expensive per individual than institutionalization does not take into consideration the State's need to maintain institutions while at the same time provide community-based treatment. *Id.*

[44] *Id.* at 2190.

[45] *Id.* at 2190 (Stevens, J., concurring in part and concurring in judgment). Justice Stevens stated that "unjustified institutional isolation" can be unjustified

when it concluded only costs related to treating L.C. and E.W. should be considered in the State's fundamental alterations argument.[46] However, Justice Stevens would have merely affirmed the opinion of the Eleventh Circuit Court of Appeals rather than remanding the case again.[47]

C. *Justice Kennedy's Concurring Opinion*

Justice Kennedy, although concurring in the judgment, observed that the opinion of the Court might have some undesirable consequences to federalism and the discretion granted to the states.[48] Justice Kennedy thought the case could and should be remanded in order for the district court to determine whether respondents had evidence sufficient to make a showing of discrimination as it has been traditionally defined.[49] Justice Kennedy disagreed with Justice Thomas and found it significant that Congress had specifically singled out "segregation" and "institutionalization" as ways in which the

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disparate treatment. *Id.* (Stevens, J., concurring).

[46] *Id.* (Stevens, J., concurring). Justice Stevens approved of the decision of the Eleventh Circuit to remand the case for reconsideration of the State's cost-based defense. *Id.* (Stevens, J., concurring).

[47] *Id.* (Stevens, J., concurring). Justice Stevens stated any misconstrual of the State's affirmative defense could be corrected by the Court here or the Eleventh Circuit and found remand to the district court unnecessary. *Id.* (Stevens, J., concurring).

[48] *Id.* at 2192 (Kennedy, J., concurring). Justice Breyer joined Justice Kennedy's concurrence in part. *Id.* at 2190 (Kennedy, J., concurring). Justice Kennedy feared, unless great deference was given to the evaluations of medical professionals, the decision of the Court might encourage states to treat the mentally disabled inadequately out of fear of litigation. *Id.* (Kennedy, J., concurring). He noted the mentally disabled sometimes are not able to cope with integrated settings and so the "most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torrent of voices and images beyond our own powers to describe" due to lack of treatment. *Id.* (Kennedy, J., concurring). Justice Kennedy also noted the dangers to federalism that are present when federal courts become involved in states' allocation and health care issues. *Id.* (Kennedy, J., concurring).

[49] *Id.* at 2194 (Kennedy, J., concurring). Justice Kennedy stated it might be possible for respondents to show discrimination within the traditional sense of the word if respondents could identify a class of persons not mentally disabled who have comparable health problems and who are treated differently by the State. *Id.* at 2193 (Kennedy, J., concurring).

mentally disabled had been discriminated against historically.[50]

D. Justice Thomas's Dissenting Opinion

In his dissent, Justice Thomas reprimanded the majority for creating a new definition of discrimination.[51] Justice Thomas stated continued treatment of patients eligible for community-based treatment in an institutional setting is not discriminatory.[52] Justice Thomas stated "the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather imposition of a standard of care."[53]

IV. DISCUSSION

In *Olmstead v. Zimring*, the United States Supreme Court established a qualified right for the mentally disabled to be treated in the most integrated setting possible.[54] However, the Supreme Court did allow the State a broader cost-based defense than that allowed by previous decisions.[55] The right to integrated treatment is to be balanced against the services already offered by the State and the burden placed on the State in providing treatment options.[56] The Court's decision in *Olmstead* continued the reasoning found in decisions under the Rehabilitation Act in which an undue burden in the form of cost of alterations can be a defense to making alterations.[57] However, the decision also broadened the definition of discrimination, which should provide the mentally disabled with an easier task in showing discrimination by state and local programs.[58]

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[50] Id. (Kennedy, J., concurring). Justice Kennedy stated these identifications by Congress do not entail that segregation and institutionalization are always discriminatory; however, these are areas in which the disabled have had a history of problems. *Id.* (Kennedy, J., concurring).

[51] *Id.* at 2194 (Thomas, J., dissenting). Justice Thomas was joined in his dissent by Justice Scalia and Chief Justice Rehnquist. *Id.* (Thomas, J., dissenting). Justice Thomas pointed to the fact that respondents alleged discrimination among members of the same class rather than discrimination between members of different classes as actionable discrimination has been traditionally defined. *Id.* (Thomas, J., dissenting).

[52] *Olmstead*, 119 S. Ct. at 2194 (Thomas, J., dissenting). Justice Thomas stated the Court seemed to "equate institutional isolation with segregation, and thereby discrimination." *Id.* at 2197 (Thomas, J., dissenting).

[53] *Id.* at 2198 (Thomas, J., dissenting). Justice Thomas argued the position taken by the majority poses significant dangers to federalism. *Id.* (Thomas, J., dissenting). Justice Thomas noted the administration of health care has traditionally been in the state's realm of power, not the federal government's. *Id.* at 2199 (Thomas, J., dissenting).

[54] *See supra* notes 26, 29, 34, 38, 39, and accompanying text. Under Title II of the ADA and its regulations, the disabled do have a right to treatment in community-settings; however, the State may have justifications for continued institutionalization. *See supra* notes 28, 32, 42, 43, and accompanying text.

[55] *See supra* notes 9, 30, 31, 36, 41, and accompanying text. Previous courts

The *Olmstead* decision does appear to place affirmative obligations upon the State, amplifying the "reasonable modifications" of past decisions.[59] It is possible, as Justice Thomas notes, that the decision will have strong effects on a state's power to control and administer its health care programs.[60]

V. CONCLUSION

The *Olmstead* decision represents changing views of the disabled, especially the mentally disabled, and their places in society. The government, through legislation, has been establishing rights for the disabled since the Rehabilitation Act of 1973 up to the present Americans with Disabilities Act of 1990. The Supreme Court and its decisions reflect a growing,

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including the lower courts in this decision either did not allow a cost-based defense at all or provided one only in very limited circumstances. *See supra* notes 6, 7, 34-36, 42, and accompanying text.

[56] *See supra* notes 23, 36, 43, and accompanying text. This is similar to the efficiency approach discussed by Wood. *See supra* note 31.

[57] *See supra* notes 14, 15, 22, 23, and accompanying text. This differs from several lower courts that interpreted the ADA as requiring more from the State than previously required by the Rehabilitation Act. *See supra* notes 30, 31, 34, 35, and accompanying text.

[58] *See supra* notes 30, 35, 49, 50, and accompanying text. This broad definition of discrimination bothered Justice Thomas. *See supra* notes 52, 53, and accompanying text.

[59] *See supra* notes 14, 15, 22, 23, 36, and accompanying text. This, along with the modified definition of discrimination, will present new questions for district courts to answer. *See supra* notes 34, 36, and accompanying text.

[60] *See supra* notes 15, 25, 36, and accompanying text. Health care has traditionally been the realm of the State. *See supra* notes 15, 48, 53.

more expansive outlook towards the disabled and their rights. In *Olmstead*, the Court continued a trend that will inevitably lead to more substantive protections for the disabled.

Emily Hogue

STATUTORY INTERPRETATION—THE CENSUS ACT—THE CENSUS ACT PROHIBITS THE PROPOSED USES OF STATISTICAL SAMPLING IN CALCULATING THE POPULATION FOR PURPOSES OF APPORTIONMENT

I. FACTS

Amendments to the Census Act, which have shifted toward the use of statistical sampling for many purposes, have created some confusion over the authority to use sampling in the Census for apportionment of the House of Representatives.[1] There is no dispute as to the use of sampling for purposes other than reapportionment of seats for the House of Representatives.[2] The Census Bureau, believing that the Census Act allowed limited sampling for apportionment of Congress, declared its intention to use two forms of statistical sampling in the 2000 Decennial Census.[3]

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[1] Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 776 (1999). The Court presented a history of the Census Act and noted that "the first departure from the requirement that the enumerators collect all census information through personal visits to every household in the Nation came in 1957." *Department of Commerce*, 119 S. Ct. at 776. In 1976, Congress amended § 141(a) to permit the Secretary to "take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date,' in such form and content as he may determine, including the use of sampling procedures and special surveys." *Id.* (citing 13 U.S.C. § 141(a) (1994)). That same year Congress amended 13 U.S.C. § 195, which is titled "Use of Sampling." 13 U.S.C. § 195 (1994). This section previously read: "Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195. The 1976 Amendments changed 13 U.S.C. § 195 to: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of statistical method known as 'sampling' in carrying out the provisions of this title." *Id.*

[2] *Department of Commerce*, 119 S. Ct. at 777. In 1957, Congress first authorized the Secretary to use sampling procedures for supplemental information other than for apportionment purposes. *Id.* at 776. There is also no dispute as to the mail back forms used (first in 1970) instead of personal visits to every household. *Id.* The Bureau did perform follow-up visits to those homes that did not respond. *Id.*

After Congress unsuccessfully tried to amend the statute explicitly to prohibit this sampling,[4] the House of Representatives brought suit seeking a declaration that statistical sampling for the purposes of apportioning Congressional representatives was unlawful and unconstitutional and to enjoin the Department of Commerce from their plan to use it in 2000.[5]

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[3] *Id.* at 770. The Department stated that "sampling for non-response will be used to complete the census enumeration." Glavin v. Clinton, 19 F. Supp. 2d 543, 547 (E.D. Va. 1998). The goal of the sampling is to cure the problem of those who are missed by the census called the "undercount." *Department of Commerce*, 119 S. Ct. at 769. Problems with the 1990 Census led Congress to enact the Decennial Census Improvement Act of 1991, which directed the National Academy of Sciences to analyze the methods that could accomplish the most precise count of the population possible. Pub. L. No. 102-135, 105 Stat. 635 (1991). Those missed in 1990 were 5.0% of Hispanics, 4.4% of African-Americans, 12.2% of American Indians (on reservations), but merely 0.7% of "Non-Hispanic Whites." United States House of Representatives v. United States Dep't of Commerce, 11 F. Supp. 2d 76, 79 (D.D.C. 1998). The plan at issue involves using statistical sampling to supplement the data obtained through the conventional census routine. *United States House of Representatives*, 11 F. Supp. 2d at 80. The two phases are generally known as the Nonresponse Follow-Up (NRFU) and the Integrated Coverage Measurement (ICM). *Id.* at 80-81. During the 1990 census, Bureau counters actually visited all the houses that did not return their forms by mail. *Id.* As a last resort, after as many as six trips were made to the house, the Bureau would use proxy data either from neighbors or generated by computer to estimate the number of people living in the unit. *Id.* Under this proposed NRFU plan, census counters would only visit approximately 22.5 million houses as opposed to 34 million by the traditional standard. *Id.* at 81. The Integrated Coverage Method involves a method referred to as "capture/recapture" in order to estimate any undercount after the original census is complete. *United States House of Representatives*, 11 F. Supp. 2d at 80.

[4] *Department of Commerce*, 119 S. Ct. at 771 (citing Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong. Tit. VIII(b)(1), at 65 (1997)). Congress attempted to alter § 141(a) to state, "Notwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in Congress among the several States." *Id.* President Clinton vetoed the bill. *Id.*

[5] *Id.* The Constitution states, "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *See* United States House of Representatives, 11 F. Supp. 2d at 79

One month later four counties and residents of thirteen states also filed suit in the District Court for the Eastern District of Virginia against President William Clinton, the Department of Commerce, and the Bureau of the Census.[6] One of the plaintiffs argued that if allowed, statistical sampling would cause the loss of a House seat from his home state.[7] In these cases, the district courts held that plaintiffs had standing due to their interest in a loss of federal funds and vote dilution and granted plaintiffs' motions for summary judgment.[8] The United States Supreme Court granted certiorari, consolidated the two cases for appeal,[9] and by a vote of five to four held: affirmed.[10] The Court held that the Census Act prohibited such a statistical adjustment for the reapportioning of seats in the House of Representatives.[11]

(citing U.S. CONST. art. I, § 2, cl. 3). Article I, section 2, clause 3 of the Constitution should be read with section 2 of the Fourteenth Amendment, which states, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Department of Commerce*, 119 S. Ct. at 768-69 (quoting U.S. CONST. amend. XIV, § 2).

[6] *Id.* at 771. Plaintiffs in this case also claimed that the proposed statistical method for the purposes of apportioning representatives among the states was unlawful and/or unconstitutional and sought an injunction to stop use of statistical sampling in the 2000 census. *Id.* The plaintiffs claimed using sampling for the purposes of apportioning representatives among the states violated Article I, section 2, clause 3 of the Constitution and the Census Act of 1976: specifically sections 21 and 195. *Glavin*, 19 F. Supp. 2d at 545.

[7] *Department of Commerce*, 119 S. Ct. at 773. The affidavit of Professor Weber showed that based on data published by the Bureau Indiana was expected to lose a House seat. *Id.*

[8] *Id.* at 775. *See Glavin*, 19 F. Supp. 2d at 548 (stating that since plaintiffs would suffer several concrete injuries their claims satisfy prerequisite of having "personal stake" in result of dispute). The 1998 Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 111 Stat. 2482, allows adversely affected parties to bring an action before a three-judge district court. *Department of Commerce*, 119 S. Ct. at 771.

[9] *Id.* at 768. The Act also allows review by direct appeal to the Supreme Court. *Id.* at 771.

[10] *Id.* at 779. The Supreme Court noted that the Bureau itself maintained the position that the 1976 Amendments prohibited sampling until 1994. *Id.* at 778.

[11] *Id.* at 779.

II. RELATED LAW

Since the present dispute is largely over the meaning of statutes some general guidelines from the Supreme Court on interpretation are useful. Usually, when two statutory provisions are in conflict, the more specific provision controls the general one.[12] Furthermore, the Court will generally avoid interpreting a provision in such a way that renders it unconstitutional if there is another rational interpretation available.[13]

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[12] Edmond v. United States, 520 U.S. 651, 657 (1997). The Court noted, "Ordinarily, where a specific provision conflicts with a general one, the specific governs." *Edmond*, 520 U.S. at 657. In *Edmond*, the dispute centered on whether Congress had permitted the Secretary of Transportation to appoint civilian judges to the Coast Guard Court of Criminal Appeals. *Id.* at 653. The Court noted that 49 U.S.C. § 323(a) authorizes the Secretary to appoint Coast Guard judges, whereas Article 66(a) of the Uniform Code of Military Justice, which petitioners claimed controlled, generally gives guidelines for the Judge Advocate of each military branch and authority to select a chief judge. *Id.* at 656-57. *Accord* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) (stating that "a general statutory rule usually does not govern unless there is no more specific rule"). The Court in *Green* also stated that a person claiming the legislation changed previous law has the burden of proving that the legislature intended such a modification. *Green*, 490 U.S. at 521. *See also* Stone v. INS, 514 U.S. 386, 397 (1995) (stating that when Congress amends statute, Court will generally presume such amendment has actual and substantial purpose); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841 (1984) (involving situation where government changed its position over time regarding interpretation of statute and took contrasting stances in court).

[13] *Edmond*, 520 U.S. at 658. The Court held that the statute did authorize the Secretary to appoint the judges and that such appointment was in accordance with the Constitution. *Id.* The Court stated that under the Appointments Clause, Congress could only give such "power to 'appoint' . . . [to] the President, department heads, and courts of law." *Id.* Congress could not grant authority to appoint to the Judge Advocate General; therefore, the Court stated that they should not render the statute clearly unconstitutional if there was another possible interpretation. *Id.* *Accord* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating when otherwise sufficient construction of statute would raise weighty constitutional problems, Court will interpret statute to avoid these doubts, unless such construction is clearly incompatible with intent of Congress). *See also* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (noting "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").

A. *History of Apportionment*

The Supreme Court addressed the issue of population variances among legislative districts within a state in *Wesberry v. Sanders*.[14] Citizens of Fulton County, Georgia, brought an action against the Governor and the Secretary of State of Georgia to enjoin them from conducting elections under the existing statute.[15] The plaintiffs' district contained two to three times the number of voters in other districts, and plaintiffs argued that their votes should weigh as much as other Georgians' votes.[16] The Supreme Court held that the Constitution mandated "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[17] The Court reasoned that if the constitutional right to vote could be destroyed or diluted then all other rights would become illusory since citizens would not have a voice to elect those who make the laws under which they must live.[18]

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[14] 376 U.S. 1 (1964).

[15] *Wesberry*, 376 U.S. at 2-3. The plaintiffs were registered voters of Georgia's Fifth Congressional District which included Fulton, Rockdale, and Dekalb Counties. *Id.* at 2.

[16] *Id.* The Fifth Congressional District of Georgia at the time had a population of 823,680. *Id.* The average population of the 10 districts was 394,312, with one district having as few as 272,154 people. *Id.*

[17] *Id.* at 7-8. This expanded the view of *Baker v. Carr*, which held that claims of vote dilution in a state district by "malapportionment" provided a justiciable question. Baker v. Carr, 369 U.S. 186, 198-204 (1962).

[18] *Wesberry*, 376 U.S. at 17. Over the years *Wesberry* and its progeny have evolved into the standard for states that requires a good-faith endeavor to accomplish precise equality. *See* Karcher v. Daggett, 462 U.S. 725, 732-33 (1983). In *Karcher*, the Court held that an approximate one percent disparity between districts in New Jersey was unconstitutional, rejecting the argument that smaller margins of error than those in census figures be considered "de minimus." *Karcher*, 462 U.S. at 732. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (holding disparities between intrastate congressional districts in Missouri unconstitutional); Reynolds v. Sims, 377 U.S. 533, 562 (1964) (emphasizing disparities in district size within state shall be carefully scrutinized when involving alleged violations of right to vote). The states are bound by case law to use the census only if it embodies the best information available. Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1, 20 (1993). The Supreme Court has stated "the Equal Protection Clause does not require the States to use total population figures derived from the federal Census

B. Challenges to Sampling

One of the first cases to address the census controversy and the issue of sampling was *Young v. Klutznick*.[19] In *Young*, the City of Detroit and its mayor brought suit to compel the Census Bureau to adjust its figures to reflect the undercount of blacks and Hispanics.[20] In both *Young* and coinciding census cases, the Bureau maintained that the Census Act and the Constitution required a "head count" for purposes

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as the standard by which . . . substantial population equivalency is to be measured." Burns v. Richardson, 384 U.S. 73, 91 (1966). In *Burns*, the Supreme Court permitted Hawaii to reapportion its districts based on non-Census data if the State could show that such use did not cause an unjust result. *Burns*, 384 U.S. at 92-93. The Court has gone as far as holding districts within a state unconstitutional when they were evidently even less disproportional than the federal census figures. *Karcher*, 462 U.S. at 732. In *Karcher*, the Court noted that even though the disparity was small it was not the result of a good-faith attempt to attain population equality. *Id.* at 727. Justice Brennan, who wrote the opinion, was concerned about drawing a line that could be abused and stated that if the Court accepts the argument that an approximate deviation of 0.7% is de minimis, "how are we to regard deviations of 0.8%, 0.95%, 1.0%, or 1.1%?" *Id.* at 732. Justice Stevens concurred in the opinion, and four other justices dissented. *Id.* at 726.

[19] 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981).

[20] Young, 497 F. Supp. at 1321. The undercount tends to be higher among minorities, renters, and the poor, producing a "differential undercount." James Pack, Note, *The Census Adjustment Cases: The Hunt for the Wily Trout*, 37 JURIMETRICS J. 35, 36 (1996). Even though the overall undercount has decreased in the past few years this differential between whites and minorities has grown. *Id.* at 36. One source stated that in 1990, only 1.3% of whites were undercounted in comparison to 5.7% for blacks. Stephen E. Fienberg, *The New York City Census Adjustment Trial: Witness for the Plaintiffs*, 34 JURIMETRICS J. 65, 69 (1993). *See* Issacharoff & Lichtman, *supra* note 18, at 7 (including table on differential undercounts between blacks and whites from 1940 to 1980). This differential result in the undercount arises partly from lack of education, difficulty in counting homeless or those with transitory living arrangements, communication barriers between those who do not speak English well, and those who do not want to be counted for fear of revealing information that violates immigration laws, zoning or health ordinances. Abby L. Jennis, *The Census Undercount: Issues of Adjustment*, 18 COLUM. J.L. & SOC. PROBS. 381, 382 n.10 (1984). *See also* Dennis L. Murphy, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969, 969-70 (1991) (arguing that since illegal aliens are not allowed to vote including them in apportionment count contravenes constitutional principle of one person to one vote).

of apportionment.[21] The district court held that using the adjusted data was neither prohibited by the Census Act nor the Constitution and that the Bureau was required to make the statistical adjustment.[22] The Court of Appeals for the Sixth Circuit reversed, holding that the plaintiffs did not have standing.[23] The court held that since the Constitution does not mandate that states use the official census figures for reapportionment of their own houses the causal connection was not present and Michigan was an intervening third party.[24] While the court stated the issue was not ripe for adjudication and never addressed the merits of whether the statute allowed the adjustment,[25] it noted the Bureau's position opposing the adjustments on several occasions.[26]

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[21] Young v. Klutznick, 652 F.2d 617, 626 (6th Cir. 1981). *See* Jeffrey S. Crampton, *Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1990 DET. C.L. REV. 71, 81-82 (1990) (presenting history of *Young* and *Carey*). *See also* Cuomo v. Baldrige, 674 F. Supp. 1089, 1091 (S.D.N.Y. 1987) (holding that Census Bureau appropriately resolved that adjustment was not technically attainable or practicable); Carey v. Klutznick, 508 F. Supp. 420, 429 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981) (*Carey III*) (observing Bureau's assertion that even if Census Act and Constitution allowed for statistical adjustment, it would be impossible to allocate national undercount on state-by-state basis); City of Philadelphia v. Klutznick, 503 F. Supp. 663, 678 (E.D. Pa. 1980) (noting Bureau's belief that Constitution only permits headcount and bans use of such statistical sampling and that Congress has plainly rejected such adjustment in Census Act). Today, the sole constitutional requirement of the census is for the apportionment of the House of Representatives. Sheldon T. Bradshaw, Note, *Death, Taxes, and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 GEO. WASH. L. REV. 379, 384-85 (1996) (noting Constitution originally required census data to be used also for direct tax until Sixteenth Amendment passed). While not constitutionally required, the data is also used for many other purposes such as deciding the allotment of the states' electoral votes for the election of the President, allocating the expenditure of federal funds, determining the Consumer Price Index, distinguishing antitrust purposes, drawing boundaries for several states' own legislative districts, and defining local governmental needs. *Id.* at 385. In *Carey v. Klutznick*, a case brought within a month of *Young*, the State and City of New York claimed that the census figures should be adjusted for the undercount for representation and federal funds. Carey v. Klutznick, 508 F. Supp. 404, 407 (S.D.N.Y. 1980) (*Carey I*). The district court in *Carey I* held that neither the Constitution nor the Census Act prohibited statistical adjustments for apportionment purposes and granted partial summary judgment for the plaintiffs. *Carey I*, 508 F. Supp. at 415. The district court relied partly on *Wesberry* in their decision. *Id.* at 414-15.

[22] *Young*, 497 F. Supp. at 1333. District Judge Gilmore stated that the framers of the Constitution would have wanted such an adjustment to be done for the purposes of achieving equal representation. *Id.*

[23] *Young*, 652 F.2d at 626. In order to satisfy the conditions of Article III standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (stating plaintiff must suffer concrete harm that is imminent with causal relationship to the action(s) complained of, where it

The Supreme Court again addressed the issue of sampling in the census in *Wisconsin v. New York*.[27] In *Wisconsin*, several cities, organizations, and citizens brought suit challenging the Secretary of Commerce's decision not to adjust statistically the 1990 census to remedy the undercount.[28] A unanimous

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is more than speculative such harm "will be redressed by a favorable decision").

[24] *Young*, 652 F.2d at 624. Since Michigan could choose to adjust the figures the injury was therefore not traceable to the Department of Commerce and did not depend on defendants' actions. *Id.* at 623. *See also* Christopher M. Taylor, *Vote Dilution and the Census Undercount: A State-by-State Remedy*, 94 MICH. L. REV. 1098, 1116-17 (1996) (arguing that parties aggrieved by differential undercount do not have standing as to Secretary of Commerce but instead could sue their state governments to require use of most accurate information available when constructing intrastate districts). In *Carey III*, the court also reversed and remanded the decision of the trial court in order to allow potentially harmed states to join the suit. Carey v. Klutznick, 653 F.2d 732, 739-40 (2d Cir. 1981). The court emphasized that the House of Representatives has 435 seats and the result of a state gaining a representative is that another state loses one. *Carey III*, 653 F.2d at 736. The court never reached the merits of whether statistical adjustment was permitted by the Constitution or the Census Act because the suit was ultimately dropped. Crampton, *supra* note 21, at 83.

[25] *Young*, 652 F.2d at 625-26. The court stated that the hardship to the plaintiffs might not occur, depending on how the Michigan legislature acts. *Id.* at 626.

[26] *Id.* at 621. The Bureau stated that since the 1970 census this itemization has never been adjusted to reflect any approximate undercount. *Id.* Furthermore, the Bureau was of the opinion that Congress had prohibited by statute this kind of adjustment for apportionment purposes of Congress. *Id.* The Court noted that the Bureau could not "break the undercount rate down by state or locality." *Id.* at 620-22. Namely, "[t]he undercount cannot be accurately distributed to 'subnational geographic units' because we do not know in which communities the undercounted live." *Id.*

[27] 517 U.S. 1 (1996).

[28] *Wisconsin*, 517 U.S. at 10. The Director of the Bureau of the Census chose to use a Post Enumeration Survey (PES) adjustment. *Id.* The Secretary of Commerce was opposed to this decision to adjust and the Department of Commerce announced in October of 1987 that statistical adjustments would not be used in the 1990 census. *Id.* The suit was brought in the Eastern District of New York

Court reversed the decision of the court of appeals,[29] stating that strict scrutiny did not apply to census cases.[30] The Court

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where Judge McLaughlin dismissed the action. City of New York v. United States Dep't of Commerce, 822 F. Supp. 906, 931 (E.D.N.Y. 1993).

[29] *Wisconsin*, 517 U.S. at 24. The Court of Appeals for the Second Circuit, relying on the *Wesberry, Reynolds* line of cases, held that strict scrutiny applied because the fundamental right to vote was at issue and certain minority groups were adversely affected. City of New York v. United States Dep't of Commerce, 34 F.3d 1114, 1125-29 (2d Cir. 1994), *rev'd*, 517 U.S. 1 (1996). The dissenting circuit judge pointed out that the majority was in conflict with two decisions from courts of appeals in other circuits. *City of New York*, 34 F.3d at 1131-32 (Timbers, Senior Circuit Judge, dissenting) (citing City of Detroit v. Franklin, 4 F.3d 1367 (6th Cir. 1993); Tucker v. United States Dep't of Commerce, 958 F.2d 1411 (7th Cir. 1992)). *Tucker* was the first case to reach the court of appeals regarding the constitutionality of the Secretary's conclusion not to adjust the 1990 census. Bradshaw, *supra* note 21, at 394. In *Tucker*, several Illinois citizens sued the Department of Commerce alleging that failing to adjust the census resulted in the state losing a substantial share of federal funds and representation in the House of Representatives. *Tucker*, 958 F.2d at 1412. Writing for the court, Judge Posner noted that the apportionment cases involved discrimination as opposed to "innocent inaccuracy." *Id.* at 1418. The court was also hesitant to second guess statisticians and stated it might be otherwise if there were judicially administrable standards or guidelines given in the Census statutes. *Id.* at 1417. The court also noted that there was disagreement among the experts as to whether the adjustment would make state and local counts more accurate. *Id.* at 1413.

In the case of *City of Detroit*, the city and the mayor challenged the census methods. *City of Detroit*, 4 F.3d at 1369. These plaintiffs sued then Secretary of Commerce Barbara Franklin, complaining they had been injured by being underrepresented with regard to other Michigan cities and by receiving less federal funds than they were entitled to. *Id.* These were the same plaintiffs in *Young*, which challenged the census under basically the same claim. *Id.* at 1373. *See supra* notes 20-26 and accompanying text (discussing *Young*). The court again held that the City of Detroit lacked standing because the Constitution does not command the State to use official census figures for intrastate districting. *City of Detroit*, 4 F.3d at 1374. The court did state that plaintiffs had standing to challenge the loss of federal funds. *Id.* at 1375. However, the court stated that the plaintiffs' argument is similar to saying Article I, section 2, clause 3 of the Constitution creates a "constitutional right to census accuracy." *Id.* Essentially, any change granting funds to Detroit would decrease funds to some other city because there is a fixed amount or limit of the total available funds. *Id.* at 1378. The court affirmed summary judgment against the plaintiffs. *Id.* Thus, the Sixth Circuit and the Seventh Circuit are generally in accord holding that the Apportionment Clause does not "create a constitutional right to census accuracy" or permit litigation merely because one disagrees with the Census Bureau's procedures. Bradshaw, *supra* note 21, at 397.

[30] *Wisconsin*, 517 U.S. at 20. The Court stated that bearing in mind the Constitution's wide delegation of authority to Congress and the constitutional

emphasized the discretion the Constitution grants Congress and, since Congress had given the Secretary discretion, gave his decision deference.[31] When considering the constitutional purpose, the Secretary decided that distributive accuracy be-

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purpose of the census, the Secretary's decision was only required to be reasonably related to the achievement of an actual enumeration. *Id.* The Court noted that the court of appeals had used a stricter standard than the Supreme Court previously applied in cases brought against the Secretary. *Id.* at 13-15 (citing Department of Commerce v. Montana, 503 U.S. 442, 464 (1992); Franklin v. Massachusetts, 505 U.S. 788, 806 (1992)). In *Montana*, the State of Montana, several state officials, and members of the Montana Congress challenged the system to determine how many representatives would be allocated to each state. *Montana*, 503 U.S. at 446. Under this system, called the method of equal proportions (which was enacted in 1941), Montana lost a House seat and was left with only one representative. *Id.* at 445. Noting a substantial difference between Montana and the ideal district, a majority of a three-judge district court applied a similar standard used in *Wesberry* and held the statute was unconstitutional. *Id.* at 446-47. The Supreme Court reversed. *Id.* at 466. The Court noted that *Wesberry* and its progeny all involved intrastate apportionment. *Id.* at 460. The Court emphasized the deference given to Congress and that their "apparently good-faith choice of a method of apportionment" was not subject to strict scrutiny. *Id.* at 464. For further discussion of what (if any) effect *Wesberry* should have on the census, see generally Donald T. Deyo, *To Adjust or Not To Adjust: That Is the Legal and Political Question*, 13 CHICANO-LATINO L. REV. 114 (1993) (stating *Reynolds* line of cases involved claims that were not in serious dispute and judicially manageable; whereas census cases are much more complicated and thus may be nonjusticiable). *But see* Recent Case, *Statutory Interpretation—Census Act—Special: District Court Holds that Statistical Sampling Cannot Be Used for Congressional Apportionment,* 112 HARV. L. REV. 566, 569-70 (1998) (comparing decision to knowingly leave undercount to fractional status many minorities had before Fourteenth Amendment stating "there is little practical difference between counting a person as three-fifths of a person and counting only three-fifths of such persons").

Franklin involved the decision to appropriate federal workers who were serving overseas to particular states for reapportionment purposes. *Franklin,* 505 U.S. at 790-91. The Bureau had previously not counted servicemen overseas to their home except in 1900 and in 1970, during the Vietnam War. *Id.* at 792-93. Massachusetts and two registered voters were among the plaintiffs, who alleged that the decision resulted in Massachusetts losing a House seat and Washington State gaining one. *Id.* The Supreme Court held that even though the Secretary's decision was not mandated by the Constitution it was not inconsistent with the text or history and was well within the discretion bestowed upon him. *Id.* at 806.

[31] *Wisconsin,* 517 U.S. at 23. The Court noted the deference given in previous cases such as *Montana* and *Franklin. Id.* at 18. Another case involving such deference was *Baldrige v. Shapiro,* where the Court observed the extensive scope of Congress' discretion over the census. *Id.* at 19 (citing Baldrige v. Shapiro, 455 U.S. 345, 361 (1982)).

tween states was more important than total numerical accuracy for the country.[32] While expert statisticians disagreed over whether an adjustment would be more accurate on the state level,[33] the Secretary was not convinced that the Post Enumeration Survey based adjustment would improve distributive accuracy any more than the unadjusted figures.[34] Furthermore, the Secretary seemed concerned that a departure from traditional counting methods might pave the road for future political altering of the numbers.[35]

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[32] *Wisconsin*, 517 U.S. at 20. *See also* Kenneth W. Wachter, *The Census Adjustment Trial: An Exchange*. 34 JURIMETRICS J. 107, 114-15 (1993) (agreeing that Secretary Mosbacher's assessment was reasonable considering that federal funds and House seats are distributed among geographical units, not among groups based on race, age, or gender). Wachter was involved in *City of New York v. Department of Commerce* by serving on the Special Advisory Panel and is a Professor of Statistics and Demography. *Id.* at n.a.

[33] *Wisconsin*, 517 U.S. at 23-24. The Undercount Steering Committee voted seven to two for an adjustment to rectify the undercount and was joined by Dr. Barbara Bryant, then Director of the Census. *See* Taylor, *supra* note 24, at 1110. *But see* David A. Freedman, *Adjusting the Census of 1990*, 34 JURIMETRICS J. 99, 100 (1993) (agreeing with Secretary's decision not to adjust); Wachter, *supra* note 32, at 108 (stating that Secretary Mosbacher's decision not to adjust was entirely reasonable and correct). Even the Director of the Census Bureau, who voted for adjustment, stated that "[a]djustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." *Wisconsin*, 517 U.S. at 23-24.

[34] *Id.* at 23. The Court also pointed out that this kind of adjustment would have been the first time ever that the count for each state for apportionment purposes would have reflected the counts of other states. *Id.* at 22. *See also* Wachter, *supra* note 32, at 108-09 (commenting about four types of errors with proposed statistical method).

[35] *Wisconsin*, 517 U.S. at 11-12. The Secretary noted that minor changes in the way adjustment was done could have a large impact on apportionment and that this impact could be chosen before a certain method was selected. *Id.* The Secretary also stated that such an adjustment might lessen the incentive for local leaders to help in the initial count. *Id.*

III. *DEPARTMENT OF COMMERCE V. UNITED STATES HOUSE OF REPRESENTATIVES*

A. *Opinion of the Court*

In *Department of Commerce v. United States House of Representatives*, the Supreme Court held that the Census Act prohibited the proposed plan to use statistical sampling for the purpose of apportioning representatives to Congress.[36] First, the Court held that due to the imminent nature of the use of sampling and the potential of vote dilution and other harm the plaintiffs satisfied the requirements of Article III standing.[37] Addressing the merits, Justice O'Connor concluded that even after the 1976 Amendments, the Census Act did not allow sampling for apportionment purposes.[38] The Court noted that the Bureau had itself maintained that position prior to the 1976 Amendments until 1994.[39] Justice O'Connor limited her decision to the statute, yet did note that the tradition of 200 years of prohibiting sampling for apportionment was relevant to provide a context for the textual interpretation.[40] Justice O'Connor also noted that nothing in the legislative history signaled a change and that if such a major turn were to be made, Congress would have made it more apparent.[41]

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[36] 119 S. Ct. 765, 779 (1999). Justice O'Connor wrote the opinion of the Court and concluded that since § 195 clearly prohibited sampling for the apportionment of representatives among states, addressing any question of constitutionality was unnecessary. *Department of Commerce*, 119 S. Ct. at 779.

[37] *Id.* at 775 (citing Allen v. Wright, 468 U.S. 737, 751 (1984)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). *See supra* note 23 and accompanying text (discussing Article III standing requirements). The Court in *Department of Commerce* noted there is definitely a "traceable link" between using sampling in the census and Indiana's loss of a House seat and that an injunction would redress such injury. *Department of Commerce*, 119 S. Ct. at 774. Some of the plaintiffs were alleging possible vote dilution between the districts within their state. *Id.* Some previous cases held this cause of action did not meet the causation requirement because the states were not constitutionally bound to use the census information for their own districting purposes. *See supra* notes 23-24 and accompanying text. In the present case, the Court noted that several of the counties with claims have state Constitutions or other laws requiring use of federal decennial census numbers. *Department of Commerce*, 119 S. Ct. at 774. Therefore, the Court held that this anticipated "intrastate vote dilution satisfies the injury-in-fact, causation, and redressibility requirements." *Id.* at 775. The Court then affirmed summary judgment, stating that appellants had failed to put forth specific facts evincing any genuine issue as to standing. *Id.* at 773. The Court gave deference to the affidavit of Professor Weber, who concluded it was highly likely that the nine counties would lose population if the proposed method was used. *Id.* The Court stated that "general assertions" about Professor Weber's information and method were not enough to raise a genuine issue of material fact. *Id.* at 775.

[38] *Id.* at 777 (noting that broad scope of authority given to Secretary in § 141(a) is limited by § 195, which is specifically titled "Use of Sampling"). *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989) (stating that "[a] general statutory rule usually does not govern unless there is no more specific

B. Justice Scalia's Concurring Opinion

Justice Scalia concurred in the opinion, emphasizing the importance of the Constitution and making certain textual points.[42] Justice Scalia noted that even if it is not clear that

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rule."). *See supra* note 1 and accompanying text (describing 1976 Amendments to §§ 141 and 195).

[39] *Department of Commerce*, 119 S. Ct. at 778 (citing Young v. Klutznick, 652 F.2d 617, 621 (6th Cir. 1981); Carey v. Klutznick, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (*Cary I*); City of Philadelphia v. Klutznick, 503 F. Supp. 663, 678 (E.D. Pa. 1980)). *See supra* notes 21, 26, and accompanying text. Justice O'Connor noted that the Department of Commerce had not invoked *Chevron* regarding the Bureau's interpretation of the Census Act. *Department of Commerce*, 119 S. Ct. at 778 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

[40] *Department of Commerce*, 119 S. Ct. at 777. Justice O'Connor stated the textual argument over the "except/shall" language in § 195 must be read in the broader context. *Id.* For over 200 years, federal statutes have forbidden statistical sampling for apportionment. *Id.* Justice O'Connor also noted that the First Congress passed a law requiring the census enumerators to vow under oath that they would conduct "a just and perfect enumeration" of everyone under their authority. *Id.* at 775 (citing Act of Mar. 1, 1790, § 1, 1 Stat. 101).

[41] *Department of Commerce*, 119 S. Ct. at 779. Justice O'Connor noted that it is doubtful after the clear prohibition of sampling for apportionment purposes in 1957 Congress would take a contrary stance by making such a subtle change in the text on an issue that is so important. *Id.* Chief Justice Rehnquist and Justice Kennedy joined this part (III-B) of the opinion. *Id.* at 768. Justice Scalia, joined by Justice Thomas, in part I of his concurrence stated that he did not regard what was said or left silent by legislators as relevant to the issue. *Id.* at 780 (Scalia, J., concurring).

[42] *Id.* at 779-80 (Scalia, J., concurring). Justice Scalia was joined by Justice Thomas and Chief Justice Rehnquist and Justice Kennedy as to part II. *Id.* (Scalia, J., concurring).

the Census Act prohibits sampling, it is dubious whether sampling satisfies the constitutional requirement of an "actual Enumeration."[43] Justice Scalia also noted that estimating the population was a possibility for the founding fathers and that it may have been more difficult to reach all the people 200 years ago.[44]

C. *Justice Breyer's Dissenting Opinion*

The four dissenting justices viewed the 1976 Amendments as mandating sampling, if feasible, for purposes other than apportionment while merely permitting sampling for apportionment purposes.[45] Justice Breyer dissented and took somewhat of a compromising approach, stating that the Census Act does not bar sampling when used to supplement traditional enumeration methods instead of as a substitute.[46]

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[43] *Id.* at 781 (Scalia, J., concurring) (citing U.S. CONST. art. I, § 2, cl. 3). Justice Scalia stated that "[i]n these circumstances, it is our practice to construe the text in such a fashion as to avoid serious constitutional doubt." *Department of Commerce*, 119 S. Ct. at 781 (Scalia, J., concurring) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). To further illustrate this view Justice Scalia noted that dictionaries from approximately the time when the Constitution was ratified showed that "enumeration" was inconsistent with sampling. *Department of Commerce*, 119 S. Ct. at 781 (Scalia, J., concurring).

[44] *Id.* at 781 (Scalia, J., concurring). Thomas Jefferson estimated the population of Virginia in 1872 based on certain demographic presumptions and finite information, which was considered very accurate. *Id.* (Scalia, J., concurring).

[45] *Id.* at 786 (Stevens, J., dissenting). Justice Breyer agreed with the conclusion reached in part I of Justice Stevens' dissent (that the Census Act was not a bar to such adjustment), but for different reasons. *Id.* at 782 (Breyer, J., dissenting). Justice Breyer joined parts II (arguing that Constitution was not a bar to proposed sampling) and III (regarding standing) of Justice Stevens' dissent. *Id.* (Breyer, J., dissenting).

[46] *Id.* at 782 (Breyer, J., dissenting). Justice Breyer felt that the Integrated Coverage Measurement (ICM) was permissible because it only used sampling to determine the last 10% of people in a given tract. *Id.* at 785 (Breyer, J., dissenting).

D. Justice Stevens' Dissenting Opinion

Justice Stevens dissented and emphasized the wide discretion that the Constitution grants to Congress.[47] Justice Stevens noted that since the Census Act intends to meet the aspiration of equal representation, sampling would be more accurate and complete.[48] Justice Stevens argued that it is irrational that the textual change did not confer any new authority to the Secretary since the Secretary already could use sampling for purposes other than apportionment before the Amendments.[49]

E. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg agreed with Justice Stevens on the merits, but stated that she would not have determined whether the other appellees, those with intrastate districting claims, had standing.[50]

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[47] *Id.* at 789 (Stevens, J., dissenting) (citing Wisconsin v. New York, 517 U.S. 1, 3 (1996)). Justice Stevens stated an "actual Enumeration" does not restrict the power of Congress to determine the "Manner" of the enumeration. *Department of Commerce*, 119 S. Ct. at 788 (Stevens, J., dissenting). Justices Ginsburg and Souter joined Justice Stevens' dissent as to parts I and II, and Justice Breyer joined as to parts I and II. *Id.* at 786. Justice Stevens stated that § 141(a) plainly grants the Secretary unqualified authorization to use sampling for the decennial census and, furthermore, that this is the only census that apportions seats for Congress. *Id.* (Stevens, J., dissenting). The dissenters believed that while § 195 does not mandate the Secretary of Commerce to use sampling for apportionment purposes, it does not prohibit it either. *Id.* (Stevens, J., dissenting). Justice Stevens also made the textual argument that since § 141(a) of the Census Act refers to the decennial census and § 195 refers to both the decennial and the mid-decade censuses the more specific language in § 141 should control in a conflict. *Id.* (Stevens, J., dissenting) (citing Edmond v. U.S., 520 U.S. 651, 657 (1997)).

[48] *Id.* at 788 (Stevens, J., dissenting) (stating that goal of equal representation is best advanced by use of method that is precise).

[49] *Id.* (Stevens, J., dissenting). Justice Stevens indicated the overall purpose of the 1976 Amendment was to arrange for a mid-decade census for miscellaneous purposes besides apportionment between states. *Id.* at 787 (Stevens, J., dissenting). However, Justice Stevens argued that if the Court's opinion is correct in claiming the Secretary retained essentially the same authority after the Amendment, there was no real purpose for the textual change. *Id.* at 788 (Stevens, J., dissenting).

[50] *Id.* at 789 (Ginsburg, J., dissenting). Justice Souter joined this portion of

IV. DISCUSSION

In *Department of Commerce v. United States House of Representatives*, the Supreme Court emphasized that even though previous changes shifted toward the use of sampling for many purposes the language of the statute still prohibited statistical adjustment for apportionment purposes.[51] The Court noted that the Bureau of the Census had itself interpreted the statute that way after the amendments.[52] The majority declared that plaintiffs challenging intrastate district systems had standing as to the Department of Commerce.[53] Justice O'Connor did not specifically reach a constitutional decision, yet the references to the long history of an actual count seem to suggest that a departure from the traditional methods may not be soon forthcoming.[54] The plurality stated that even if the statute was unclear, there would be serious constitutional doubt as to whether sampling was allowed.[55] Furthermore,

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the opinion. *Id.* at 787 (Ginsburg, J., dissenting). Justices Ginsburg and Souter (who joined parts I and II of Justice Stevens' dissent) stated that while they agreed that appellee Hofmeister of Indiana had standing due to Indiana's expected loss of a Congressional seat, they would have refrained from deciding whether the other appellees had established standing regarding their intrastate districting claims. *Id.* (Ginsburg, J., dissenting).

[51] *See supra* notes 36-41 and accompanying text. While § 141 appears to allow sampling, § 195 is titled "Use of Sampling" and purports to prohibit it for reapportionment purposes. *See supra* note 1 and accompanying text (describing 1976 Amendments).

[52] *See supra* notes 21, 26, 39, and accompanying text (discussing Bureau's position in *Young* and other cases). Justice O'Connor felt that such an important change in the Act would not have been made by such a subtle change in the language. *See supra* note 41 and accompanying text.

[53] *See supra* note 37 and accompanying text. This holding made plain the change from the former view that plaintiffs would only have standing as to their state. *See supra* notes 23, 24, 29, and accompanying text (discussing *Young* and *City of Detroit*).

[54] *See supra* notes 38-40 and accompanying text. Justice O'Connor emphasized that the statute should be read in the broader context that for over 200 years, there has been a federal statute prohibiting sampling for apportionment purposes. *See supra* note 40 and accompanying text.

[55] *See supra* notes 42-44 and accompanying text. Justice Scalia felt that sampling is not consistent with an "actual Enumeration" and that the framers did not intend for anything except a headcount. *See supra* note 43 and accompanying text.

in the previous cases where the Court emphasized deference given to the Secretary, the decisions under scrutiny were supported by some history and precedent.[56]

The dissenting Justices would have allowed sampling for apportionment purposes.[57] The dissenters inferred that the textual change to the Census Act must have granted the authority to use sampling for apportionment[58] and emphasized the deference that the Constitution gives to Congress.[59]

V. CONCLUSION

Department of Commerce v. United States House of Representatives answers the question of whether statistical sampling may be used for apportionment purposes among the states. The language of the statute is currently a barrier to such sampling. Whether the Constitution itself is a complete barrier, should the statute be changed or repealed, is a less certain question. The decision appears to leave states free to choose whether to use the adjusted figures for their intrastate districts and leaves open the possibility of using statistical numbers for federal funds. As a practical matter, instead of bringing suits against the Department of Commerce or the

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[56] *See supra* notes 29-31 and accompanying text. The present case is unique in this regard. The deference to the Secretary's decision not to adjust in *Wisconsin* was supported by over 200 years of carrying out the census in that manner. *See supra* notes 28-31, 40, and accompanying text. In *Montana*, the statute that plaintiffs were complaining of had been in effect for approximately half a century. *See supra* note 30 and accompanying text. In *Franklin*, though there was less precedent for the Secretary's decision to allocate servicemen overseas to their home state, it had been done twice before. *See supra* note 30 and accompanying text.

[57] *See supra* notes 45-49 and accompanying text. The dissenters felt that the "except/shall" language commanded the Secretary to use sampling for other purposes, when feasible, but still allowed him to use sampling for apportionment. *See supra* note 1 and accompanying text (describing 1976 Amendments).

[58] *See supra* note 49 and accompanying text. The dissenters felt it would be pointless to make a textual change to a statute that had no real effect and did not grant more authority to the Secretary than what he previously had. *See supra* note 49 and accompanying text.

[59] *See supra* note 47 and accompanying text. *Wisconsin* and other cases where the decisions of the Secretary were attacked usually mentioned such deference in the opinion. *See supra* notes 30, 31, 47, and accompanying text.

Bureau of the Census, many more suits may be brought against state and local governments when the parties feel they have been injured due to a state government's decision to adjust or not to adjust.

Jason Bush

EVIDENCE—EXPERT WITNESSES—*DAUBERT* APPLIES TO ALL EXPERT TESTIMONY

I. FACTS

In July 1993, the right back tire of a minivan driven by Patrick Carmichael blew out, resulting in an accident that killed one passenger and injured the other passengers.[1] The Carmichaels filed a product liability action in the United States District Court for the Southern District of Alabama against Kumho & Company and Kumho U.S.A., the tire manufacturer and distributor respectively.[2] The Carmichaels sought to admit testimony of a mechanical engineer expert, Dennis Carlson, Jr., who was expected to opine that a defect in the tire's manufacture or design caused the blowout.[3] Kumho filed a motion to exclude Carlson's testimony under Rule 702 of the Federal Rules of Evidence.[4]

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[1] Kumho Tire Co., Ltd. v. Carmichael, 119 S. Ct. 1167, 1171 (1999). Patrick Carmichael, Luzviminda Carmichael, Carina Horn, Patrick Carmichael, Jr., Leona Carmichael, Shameela Carmichael, and Natimah Carmichael all suffered injuries. Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1516 (S.D. Ala. 1996). The passenger killed was Janice Horn, daughter of plaintiff Luzviminda Carmichael. *Samyang Tires*, 923 F. Supp. at 1516.

[2] *Kumho Tire Co.*, 119 S. Ct. at 1171. Defendant Kumho & Company designed and manufactured the tire. *Samyang Tires*, 923 F. Supp. at 1517. Defendant Kumho U.S.A., a separate entity from Kumho & Company, distributed Kumho's products in the United States. *Id.* The defendants will be referred to collectively as "Kumho."

[3] *Kumho Tire Co.*, 119 S. Ct. at 1171. Carlson, who was an expert in tire analysis, testified in a deposition that the tire failed because of poor adhesion between the component parts of the tire, a condition which may be caused by abuse or defect. *Id.* at 1172. The form of abuse at issue was "overdeflection," which may occur when a tire is underinflated or overloaded. *Id.* To determine whether a defect had caused the tire failure Carlson looked for four indicators of overdeflection. *Id.* When he did not find two of the four indicators in the tire, he ruled out overdeflection and concluded the loss of adhesion must have been caused by a manufacturing or design defect. *Id.* at 1172-73.

[4] *Id.* at 1173. Federal Rule of Evidence 702 reads as follows: "If scientific,

The district court analyzed Carlson's methodology to determine whether his expert testimony was admissible according to the four reliability-related *Daubert* factors.[5] The district court held that none of the criteria set forth by the Supreme Court in *Daubert* for the admissibility of scientific evidence under Rule 702 had been satisfied and thus granted Kumho's motion to exclude the expert's testimony.[6] The Eleventh Circuit Court of Appeals reversed, holding that the district court erred by applying the *Daubert* analysis because *Daubert*, in its view, applied only where an expert's testimony is based on scientific principles and Carlson's testimony was premised on experience, not science.[7] Citing uncertainty in the lower courts about the application of *Daubert*, the United States Supreme Court granted certiorari and held: reversed.[8] The

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technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. Kumho claimed specifically that Carlson's testimony should be excluded because his methodology did not meet Rule 702's reliability requirement. *Kumho Tire Co.*, 119 S. Ct. at 1173.

[5] *Id.* at 1173 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-94 (1993)). *See infra* notes 23-26 and accompanying text (setting forth *Daubert* reliability factors).

[6] *Kumho Tire Co.*, 119 S. Ct. at 1173. Applying the *Daubert* factors, the district court originally found as follows: (1) Carlson's method for analyzing the tire was not susceptible to testing, (2) there were no publications or papers which discussed his techniques, (3) Carlson testified that he did not know the potential rate of error of his method, and (4) the court was not able to conclude that Carlson's method of analysis was generally accepted in the relevant scientific community. *Samyang Tires*, 923 F. Supp. at 1520-22. The plaintiffs moved the court to reconsider, arguing that application of the *Daubert* factors was too "inflexible." *Kumho Tire Co.*, 119 S. Ct. at 1173. After reconsidering the issue, the Court concurred that *Daubert* should be applied flexibly, but it still found inadequate indications of the reliability of Carlson's analysis particularly as to his methodology. *Id.*

[7] *Id.* The Carmichaels appealed, arguing the district court should not have applied *Daubert's* reliability factors because Carlson was not a "scientific" expert. Carmichael v. Samyang, 131 F.3d 1433, 1435 (11th Cir. 1997). The Eleventh Circuit held that the *Daubert* factors applied only when evaluating the testimony of witnesses who claim scientific expertise. *Samyang Tires*, 131 F.3d at 1435. The court stated that the *Daubert* analysis did not apply to determine the admissibility of all expert testimony and particularly did not apply where the proposed expert relied on skill- or experienced-based observations. *Id.* at 1435-36.

[8] *Kumho Tire Co.*, 119 S. Ct. at 1173. The Supreme Court expressly noted

Court held that *Daubert's* general principles of relevance and reliability apply not just to "scientific" expert testimony, but to all expert matters described in Rule 702, and that in evaluating the admissibility of non-scientific expert testimony, district courts "may" consider the specific reliability factors identified in *Daubert.*[9] The Court further held that the trial court did not abuse its discretion in excluding Carlson's expert testimony.[10]

II. RELATED LAW

A. The Frye *Standard*

For decades preceding adoption of Federal Rule of Evidence 702, the prevailing standard for determining the admissibility of expert testimony was the *Frye* standard, which had its origin in a 1923 decision by the United States Court of Appeals for the District of Columbia, *Frye v. United States.*[11] In *Frye*, the defense offered a scientist as an expert to testify that the results of a blood pressure deception test conducted on the defendant before trial proved that the defendant was innocent.[12] The court of appeals, agreeing with the district court,

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that the Fifth Circuit's decision in *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997), conflicted with the Tenth Circuit's holding in a similar case, *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir. 1996), *cert. denied*, 519 U.S. 1041 (1997). *Id.* In *Watkins*, the court held that *Daubert* applied to the proposed testimony of an engineering expert in a products liability case, reasoning that while *Daubert* dealt with expert scientific evidence, "the decision's focus on a standard of evidentiary reliability and the requirement that proposed expert testimony must be appropriately validated are criteria equally applicable to 'technical, or other specialized knowledge . . . .'" *Watkins*, 121 F.3d at 991 (quoting FED. R. EVID. 702). In contrast, the *Compton* court concluded that *Daubert* did not apply to the proposed testimony of an automotive engineer in a product liability case because the expert was not relying on "some particular methodology or technique," but rather upon "general engineering principles and his twenty-two years of experience as an automotive engineer." *Compton*, 82 F.3d at 1519. This conflict was not limited to these two circuits. *See infra* note 28 and accompanying text.

[9] *Kumho Tire Co.*, 113 S. Ct. at 1174.

[10] *Id.*

[11] 293 F. 1013 (D.C. Cir. 1923).

[12] *Frye*, 293 F. at 1013-14. The expert was to testify to the results of a systolic blood pressure deception test, which was based on the theory that "truth comes

held that the test in question had not yet "gained such standing and scientific recognition among physiological and psychological authorities" as to justify the admission of expert testimony on the test results.[13] *Frye's* "general acceptance" standard was used by the vast majority of courts to determine admissibility of expert scientific testimony from 1923 until 1975, when Federal Rule of Evidence 702 was introduced and opened the door for debate regarding the appropriate standard for decisions on the admissibility of expert scientific testimony.[14]

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without conscious effort while a falsehood requires a conscious effort which is reflected in blood pressure." *Id.* at 1014. The defendant's attempt to offer the expert witness was objected to by the attorneys for the government, and the district court sustained the objection. *Id.*

[13] *Id.* The often quoted language defined the test as follows:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized, scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. After the *Frye* decision, courts arrived at different standards for determining what constitutes "general acceptance." *See* United States v. Williams, 443 F. Supp. 269, 273 (S.D.N.Y. 1977) (holding that there must be acceptance by "substantial section" of scientific community); United States v. Zeiglar, 350 F. Supp. 685, 688 (D.D.C. 1972) (defining general acceptance as "widespread; prevalent; extensive though not universal"); PAUL C. GAINELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5 (2d ed. 1993) (discussing what constitutes general acceptance). *Frye* imposed a stricter requirement for the admissibility of expert scientific testimony than existed for other expert testimony that normally only required the testimony be relevant and not misleading. Craig H. Wisnom, *Science in Evidence: The Effect of* Daubert v. Merrell Dow *On Arizona's Frye Rule*, 36 ARIZ. L. REV. 1057, 1060-61 (1994).

[14] GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 12.4 (3d ed. 1996). The fact that neither the text to Rule 702 nor the Advisory Committee Notes to Rule 702 mentioned the "general acceptance" language from *Frye* added to the confusion. *Id.* Many federal courts responded to the adoption of Rule 702 by rejecting the *Frye* rule. JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 702.05 (2d ed. 1999). *See* United States v. Piccinonna, 885 F.2d 1529, 1531 (11th Cir. 1989) (inventing new criteria because it is not accurate to say polygraph testing lacks general acceptance for use in all circumstances); United States v. Luschen, 614 F.2d 1164, 1169 n.3 (8th Cir. 1980) (rejecting charge that government did not establish its conformity to generally accepted explanatory theory as

B. The Daubert *Test*

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[15] the Supreme Court considered for the first time a question that had divided courts and commentators—whether *Frye* had been superseded by adoption of the Federal Rules of Evidence—and concluded that it had been and, further, that Rule 702 established a new standard for the admission in federal courts of scientific expert testimony.[16] In *Daubert*, applying the *Frye* test, the district court held, and the Ninth Circuit affirmed, that the plaintiffs' expert witnesses' proposed opinion did not have "general acceptance in the field in which it belongs."[17] The Supreme Court held that the *Frye* standard, by which admissibility was determined solely by reference to whether the expert's opinion was "generally accepted," was not applica-

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required by *Frye* because court did not use *Frye* criteria); United States v. Baller 519 F.2d 463, 466 (4th Cir. 1975) (requiring evidence to be proven by demonstrable, objective criteria and not *Frye* standard). Other federal courts continued to use the *Frye* standard even after Rule 702 was adopted. WEINSTEIN, *supra* note 14, § 702.05. *See* United States v. Smith, 869 F.2d 348, 352-55 (7th Cir. 1989) (allowing expert testimony regarding spectrographic voice identification to be admitted because it was generally accepted technique); Novak v. United States, 865 F.2d 718, 722-23 (6th Cir. 1989) (requiring that expert testimony be generally accepted by relevant scientific community in order to be admitted under Rule 702); United States v. St. Pierre, 812 F.2d 417, 419-20 (8th Cir. 1987) (explaining that testimony which states characteristics and traits of abused children is admissible because it is based on principles generally accepted by relevant scientific community).

[15] 509 U.S. 579 (1993).

[16] *Daubert*, 509 U.S. at 587.

[17] *Id.* at 583-84. The plaintiffs, two minors and their parents, sued Merrell Dow Pharmaceuticals alleging that birth defects suffered by their children resulted from their mother's ingestion of the drug Bendectin during pregnancy. *Id.* at 582. Merrell Dow asked the district court for summary judgment claiming the plaintiffs could not present any admissible evidence to prove Bendectin caused birth defects. *Id.* The plaintiffs' expert witnesses' conclusions that the drug could cause birth defects were based on animal studies. *Id.* Merrell Dow's expert testified that no study had shown the drug to cause birth defects in humans. *Id.* The Supreme Court, noting the inconsistencies among the lower courts regarding the proper standard for the admission of expert testimony, granted certiorari. *Id.* at 583-84. *Compare, e.g.,* United States v. Shorter, 809 F.2d 54, 59-60 (D.C. Cir. 1987) (using "general acceptance" standard) *with* DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 955 (3d Cir. 1990) (declining to use "general acceptance" standard).

ble, having been displaced by Rule 702, which directly addresses the issue of admissibility of expert testimony and thus sets the appropriate standard for determining the admissibility of scientific expert testimony in federal trials.[18] However, the Court explained that the fact *Frye* was displaced by Rule 702 did not mean that the Rules placed no limits on the admissibility of scientific evidence; on the contrary, the Court stressed that "any and all scientific testimony or evidence" must be "not only relevant, but reliable."[19] The Court emphasized further that it is the function of the trial judge under the Rules to ensure that any and all such testimony or evidence satisfies these criteria.[20] That is, the trial courts must play a "gatekeeping" or "screening" role to guarantee that the evidence is both relevant and reliable.[21]

Regarding reliability, the Court identified four factors that the district courts might find helpful in assessing the reliability of a particular scientific theory or technique as follows[22]: (1) whether the theory can be (and has been) tested,[23] (2) whether the theory has been "subjected to peer review and publication,"[24] (3) whether the theory has a high "known or potential rate of error" and whether there "are standards controlling the technique's operation,"[25] and (4) whether the technique enjoys "general acceptance" within a "relevant scientific community."[26] The Court explained that these factors were for the trial court's consideration in making a determination as to admissibility and were not intended as a comprehensive checklist or test.[27]

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[18] *Daubert,* 509 U.S. at 588-89. The dispute as to whether Rule 702 superseded the *Frye* test or whether Rule 702 and *Frye* coexisted had divided the lower courts. *Compare* United States v. Williams, 583 F.2d 1194, 1198-1200 (2d Cir. 1978) (holding Federal Rules of Evidence supersedes *Frye* test) *with* Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1115-16 (5th Cir. 1991) (stating that *Frye* and Federal Rules coexist). *See also* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules,* 60 GEO. WASH. L. REV. 857, 876-78 (1992) (examining conflict between *Frye* and Rule 702).

[19] *Daubert,* 509 U.S. at 589.

[20] *Id.*

[21] *Id.* Theoretically, it is possible that evidence based on a scientific technique will not be generally accepted within the relevant scientific community, but still may be admitted at trial if the judge concludes that the technique is both relevant and reliable. Harlan Watkins, Note, Daubert v. Merrell Dow Pharmaceuticals, Inc.: *General Acceptance Rejected,* 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 259, 265 (1994). The *Daubert* Court noted that Rule 702 granted expert witnesses wide latitude to express opinions not afforded to ordinary witnesses. *Daubert,* 509 U.S. at 592. The defendants contended that abandonment of the general acceptance standard would result in confused juries bombarded with "absurd and irrational pseudoscientific assertions." *Id.* at 595-96. The Court stated that intense cross examination, offering conflicting evidence, and proper jury instructions would be appropriate methods of attacking shaky, but admissible evidence. *Id.* at 596. *See* Rock v. Arkansas, 483 U.S. 44, 61 (1987) (holding that cross examination is adequate tool for exposing inconsistencies in expert testimony).

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[22] *Daubert*, 509 U.S. at 593-94 (citation omitted). The Court limited its decision to the scientific context because that was the subject of the expertise presented in this case. *Id.* at 590 n.8. A trial judge, pursuant to Rule 104(a), must decide at the outset whether the expert passes the *Daubert* test. *Id.* at 592-93. According to the rule: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." FED. R. EVID. 104(a). This admission standard is largely undefined so that great discretion is placed with trial judges. Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W.L. REV. 313, 325-26 (1999). *See also* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991) (observing that judges have more control over expert witnesses than over lay witnesses). The court's inquiry under Rule 702 is a flexible one, focusing only on methodology and principles of the expert and not the conclusions. *Daubert*, 509 U.S at 595. The expert's opinion must be based on more than the expert's mere "subjective belief or unsupported speculation." *Id.* at 590. *See* Moore v. Ashland Chem., Inc., 151 F.3d 269, 276 (5th Cir. 1998) (en banc) (explaining that expert's assurances he has applied generally accepted scientific methodology is inadequate).

[23] *Daubert*, 509 U.S. at 593. Whether the expert's theory has been tested has been considered the most important factor in assessing the reliability of a proffered opinion. Margaret A. Burger, *Does the Search For Truth in Our Scholarship Continue In Our Classrooms?*, 49 HASTINGS L.J. 1179, 1180 (1998). *See also* KARL F. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) (asserting that criterion of scientific status of theory is its testability); Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 645 (1992) (contending scientific methodology is predicated on developing and testing hypothesis).

[24] *Daubert*, 509 U.S. at 594. *See also* David F. Horribin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 JAMA 1438, 1439 (1990) (discussing peer review); Arnold S. Relman & Marcia Angell, *How Good Is Peer Review?*, 321 NEW ENG. J. MED. 827, 828 (1989) (stating that peer review is necessary to evaluate quality of research).

[25] *Daubert*, 509 U.S. at 594. *See also* United States v. Smith, 869 F.2d 348, 353-54 (7th Cir. 1989) (evaluating studies of potential rate of error of spectrographic voice identification); United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978) (observing professional organization's standards controlling spectrographic analysis).

The Court in *Daubert* did not suggest whether the analysis it established was to be applied to non-scientific expert testimony as well as scientific testimony, thus resulting in conflict among the circuits as to the breadth of the Court's ruling.[28]

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[26] *Daubert*, 509 U.S. at 594. *See* United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985) (holding that widespread acceptance is significant factor in determining whether evidence is admissible).

[27] *Daubert*, 509 U.S. at 593. The Court expressed confidence in the ability of federal judges "to undertake this review." *Id.*

[28] *Id.* at 590 n.8. The circuits split over *Daubert's* application to non-scientific expert testimony with the Second, Fourth, Ninth, Tenth, and Eleventh Circuits holding that *Daubert* applied only to hard sciences. *See* Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1383 (4th Cir. 1995) (holding that *Daubert* dealt only with admissibility of expert "scientific" testimony); Thomas v. Newton Int'l Enters., 42 F.3d 1266, 1270 n.3 (9th Cir. 1994) (stating *Daubert* did not apply to expert testimony of longshoreman because it was not "scientific"); Tamarin v. Adam Caterers, Inc., 13 F.3d 51, 53 (2d Cir. 1993) (asserting that *Daubert* does not apply to accountant's expert testimony); *see also* Carmichael v. Samyang Tires, Inc. 131 F.3d 1433, 1435 (11th Cir. 1997) (expressing that *Daubert* does not apply to mechanical engineer testimony); Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir. 1996) (holding that *Daubert* did not apply to mechanical engineer).

In contrast, the First, Third, Fifth, Sixth and D.C. Circuits applied *Daubert* to all expert testimony. *See* Watkins v. Telsmith, Inc., 121 F.3d 984, 990 (5th Cir. 1997) (applying *Daubert* to appraisal expert); Den Norske Bank AS v. First Nat'l Bank of Boston, 75 F.3d 49, 56-59 (1st Cir. 1996) (allowing banker's expert testimony under *Daubert*); United States v. Velasquez, 64 F.3d 844, 848-50 (3d Cir. 1995) (applying *Daubert* to handwriting analysis); *see also* Berry v. City of Detroit, 25 F.3d 1342, 1348-52 (6th Cir. 1994) (using *Daubert* criteria with expert in police discipline); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 567-70 (D.C. Cir. 1993) (holding exclusion of expert economist's testimony pertaining to future earnings to be compatible with *Daubert*).

The Seventh and Eighth Circuits each had been inconsistent in applying *Daubert* to non-scientific expert testimony. *Compare* Roback v. V.I.P. Transp., Inc., 90 F.3d 1207, 1215-16 (7th Cir. 1996) (evaluating engineering expert's methodology with *Daubert*) *with* United States v. Williams, 81 F.3d 1434, 1441-42 (7th Cir. 1996) (declining to utilize *Daubert* with expert testimony on street gangs). *Compare* United States v. Rouse, 100 F.3d 560, 567 (8th Cir. 1996) (holding that *Daubert* did not apply to behavioral and social sciences) *with* United States v.

III. *KUMHO TIRE COMPANY, LTD. V. CARMICHAEL*

A. *Opinion of the Court*

In *Kumho Tire Co., Ltd. v. Carmichael*,[29] the Supreme Court resolved the conflict among the circuits, holding that the basic "gatekeeping" obligation imposed on trial judges by Rule 702 to ensure that expert testimony is both relevant and reliable applies to all expert testimony and not exclusively to expert testimony based on "scientific" knowledge.[30] The Court explained that the reliability standard articulated in *Daubert* was derived from the language of Rule 702, which itself admits of no distinction between "scientific" knowledge and other types of knowledge, such as "technical" or "other specialized" knowledge, and thus makes it apparent that any of these types of knowledge might properly be the subject of expert testimony.[31] The Court further observed that the testimonial latitude accorded expert witnesses (but not lay witnesses) by Rules 702 and 703, another factor supporting its decision in *Daubert*, extended to all experts and not just "scientific" ones.[32] The Court finally recognized the extreme difficulty, if

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Johnson, 28 F.3d 1487, 1496-97 (8th Cir. 1994) (applying *Daubert* to drug trafficking expert).

[29] 119 S. Ct. 1167 (1999).

[30] *Kumho Tire Co.*, 119 S. Ct. at 1174. The Court conceded that it had referred in *Daubert* only to "scientific" knowledge, but stated that this was only because the nature of the expertise at issue in the case was "scientific." *Id.*

[31] *Id.* at 1174. Kumho argued that the Eleventh Circuit was incorrect in limiting the *Daubert* factors to only "scientific" experts because the holding is contrary to the language of Rule 702, which is "broad and overlapping." Kumho's Brief at 17, Kumho Tire Co., Ltd., 119 S. Ct. 1167 (No. 97-1709). Carmichael argued that the Eleventh Circuit was correct because applying *Daubert* to all experts "would result in the widespread exclusion of experts in fields long accepted by the courts simply because they cannot satisfy criteria not relevant to their field." Carmichael's Brief at 16, Kumho Tire Co., Ltd., 119 S. Ct. 1167.

[32] *Kumho Tire Co.*, 119 S. Ct. at 1174. Federal Rule of Evidence 703 reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

not impossibility, that trial judges would encounter in trying to distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge since no clear line divides one from the others.[33]

After concluding that *Daubert* applies to non-scientific expert testimony, the Court confronted the questions of whether and, if so, how the *Daubert* reliability factors would apply to non-scientific expert evidence.[34] The Court, "emphasizing the word 'may'," held that in determining the admissibility of non-scientific testimony, a trial judge "*may* consider [the] specific factors that *Daubert* said might 'bear on' a judge's gate-keeping determination" since "some of *Daubert's* questions can help to evaluate the reliability even of experience-based testimony."[35] The Court reiterated that it had not intended the four reliability factors listed in *Daubert* to be exclusive, or definitive, but rather had meant to provide them as helpful guideposts, not all of which would necessarily be pertinent even in cases when the reliability of scientific testimony was the issue.[36] The Court thus concluded that in deciding whether to admit particular expert testimony, "a trial court should consider the specific factors identified in *Daubert*

FED. R. EVID. 703.

[33] *Kumho Tire Co.*, 119 S. Ct. at 1174. The Court stated there was no convincing need to make such distinctions since all such knowledge derived from "specialized experiences." *Id.*

[34] *Id.* at 1175.

[35] *Id.* at 1175-76. The Court stressed that trial judges "may" consider the *Daubert* factors, indicating the Rule 702 inquiry is "a flexible one." *Id.* at 1175. The Court insisted that *Daubert* questions can help assess the reliability of even experience-based testimony. *Id.* at 1176. For example, there may be instances when it is appropriate to inquire of a witness whose expertise is entirely experience-based, such as a perfume tester, "whether his preparation is of a kind that others in the field would recognize as acceptable." *Id.*

[36] *Id.* at 1175. The Court said the *Daubert* factors were "meant to be helpful, not definitive . . . . It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never have interested any scientist." *Id.* The application of *Daubert* depends on the circumstances of the particular issue in the case. *Id.* The Court noted that the gatekeeping inquiry must be "tied to the facts" of the specific case. *Id.* (quoting *Daubert*, 509 U.S. at 591).

where they are reasonable measures of the reliability of expert testimony," but left it to the trial judge to decide, in a particular case, how to determine whether particular expert testimony is reliable.[37] The trial court, the Court stated, "must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether or not* that expert's testimony is reliable."[38]

The Court finally concluded that the trial court's exclusion of Carmichael's expert's testimony by reference to the four *Daubert* factors did not constitute an abuse of discretion.[39]

B. Justice Scalia's Concurrence

Justice Scalia, along with Justices O'Connor and Thomas, agreed with the majority as to the trial judge's discretion to choose the manner of testing expert reliability.[40] While they also agreed that "the *Daubert* factors are not holy writ," these justices wrote separately to clarify that the failure in a particular case to apply one or another of them may constitute an abuse of discretion.[41]

C. Justice Stevens' Concurrence in Part and Dissent in Part

Justice Stevens concurred with the majority's determination of the applicability of *Daubert* to the particular expert testimony involved,[42] but asserted that the Court should not have addressed the question of whether the trial court abused its discretion by excluding the expert's testimony since that question was not raised by the certiorari petition.[43]

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[37] *Id.* at 1176.

[38] *Id.*

[39] *Id.* at 1176-79. The Court said that the district court based its decision on "Carlson's failure to satisfy either *Daubert's* factors or any other set of reasonable reliability criteria." *Id.* at 1179.

[40] *Id.* (Scalia, J., concurring). Scalia explained that the discretion "is not discretion to abandon the gatekeeping function" and "it is not discretion to perform the function inadequately." *Id.* (Scalia, J., concurring).

[41] *Id.* (Scalia, J., concurring)

[42] *Id.* (Stevens, J., concurring in part and dissenting in part). Stevens stated "that question was fully and completely answered." *Id.* (Stevens, J., concurring in part and dissenting in part).

IV. Discussion

In *Kumho Tire Co.*, the Court settled the significant issue of whether the *Daubert* analysis applies to issues of admissibility of non-scientific expert testimony.[44] The effect of the Court's decision in *Kumho Tire Co.* is to vest substantial discretion in the trial courts in their performance of the screening function mandated by *Daubert* in all cases involving all types of expert testimony.[45] With the exception of a loose directive that the trial courts give consideration to the *Daubert* factors that may be germane in a given case, with the goal of assuring relevance and reliability, the district courts have been given little guidance as to the proper exercise of the gatekeeping function.[46] Indeed, the result of *Kumho Tire Co.* appears to be that efforts to define specific tests for reliability of expert testimony are not especially practical in view of the wide range of areas of expertise and expert opinion.[47] Also, the insistence on mechanical application of specifically prescribed criteria—other than relevance and reliability generally—will tend to deprive the courts of needed flexibility and often prove counterproductive.[48] Nevertheless, it seems likely, particularly in light of Justice Scalia's concurrence, that the trial courts will in most cases find some of the *Daubert* reliability factors pertinent and others, if not specifically applicable, useful analytical tools in the evaluation process at least as a point of departure.[49] It is apparent as well that given the breadth of discretion recognized in *Kumho Tire Co.*, appellate review of lower courts' decisions not only of reliability and relevance, per se, but of the manner and means by which such review is conducted, will necessarily be highly deferential.[50]

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[43] *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens observed that the Court should not consider issues not raised by the certiorari petition because it is not fair to the litigants nor is it proper Court procedure. *Id.* at 1180 (Stevens, J., concurring in part and dissenting in part). He considered that a proper answer to the question whether the district court's exclusion of the expert testimony constituted an abuse of discretion required a study of the record that could be performed more efficiently by the lower court. *Id.* (Stevens, J., concurring in part and dissenting in part).

[44] *See supra* notes 29-33 and accompanying text. The Court in *Daubert* did not determine whether the analysis it established was to be applied to non-scientific expert testimony as well as scientific testimony. *See supra* note 28 and accompanying text.

[45] *See supra* notes 34-38 and accompanying text. Trial courts must play a "gatekeeping" or screening role to ensure evidence is both relevant and reliable. *See supra* note 21 and accompanying text.

[46] *See supra* notes 22-26 and accompanying text and notes 35-38 and accompanying text. The Court stated that the four factors were for consideration in making a determination as to admissibility and were not definitive. *See supra* notes 27, 36 and accompanying text.

[47] *See supra* notes 35-38 and accompanying text.

V. CONCLUSION

While *Kumho Tire Co. v. Carmichael* settled the debate among the circuits of whether the *Daubert* analysis applies to all expert testimony, the significance of the opinion is the Court's emphasis on the flexibility of the inquiry of relevance and reliability and for admission or exclusion of expert testimony. The case also recognizes the broad latitude accorded trial judges in determining whether an expert's testimony is admissible.

Stewart Lee

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[48] *See supra* notes 35-38 and accompanying text.

[49] *See supra* notes 40, 41 and accompanying text. Justice Scalia explained that the failure to apply one or another of the *Daubert* factors may constitute an abuse of discretion. *See supra* note 41 and accompanying text.

[50] *See supra* notes 38, 39 and accompanying text.

CONSTITUTIONAL LAW—"RIGHT TO TRAVEL"—FOURTEENTH AMENDMENT PRIVILEGES OR IMMUNITIES CLAUSE INVALIDATES A STATE'S DURATIONAL RESIDENCY REQUIREMENT FOR FULL WELFARE BENEFITS

I. FACTS

In 1992, the California legislature enacted a statutory provision that limited welfare contributions to residents who had lived in the state for less than twelve months to the same amount of aid they would have received from their prior state of residence.[1] While California is one of the most generous states in terms of overall welfare aid, the high cost of living in the state can substantially influence the actual level of aid received by its recipients.[2] In October 1992, the United States Secretary of Health and Human Services issued a requisite waiver granting approval for the implementation of the durational residency requirement.[3] The residency requirement was not enforced until Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[4] On April 1, 1997, two recently arrived residents to California filed an action in the Eastern District Court of California.[5] Brenda Roe moved to California from Oklahoma with her husband to seek employment.[6] Anna Doe moved to California from Washington, D.C., also seeking employment.[7] The plaintiffs sought a preliminary injunction that was granted and issued by the district court.[8] The Ninth Circuit affirmed the injunction.[9] The United States Supreme Court granted certiorari and held: affirmed.[10] Where a state statute limits a new resident's amount of welfare aid, through the use of a durational residency requirement, to the amount of aid the resident would have received in their former state of residence, this statute is unconstitutional due to the protections afforded under the Fourteenth Amendment's Privileges or Immunities Clause, notwithstanding a federal statute authorizing such durational residency requirements.[11]

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[1] Saenz v. Roe, 119 S. Ct. 1518, 1521 (1999). CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999) provides:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence. (b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following: (1) Title IV of the federal Social Security Act (subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code). (2) Title IX [sic] of the federal Social Security Act (Subchapter 19 (commencing with section 1396) of Chapter 7 of Title 42 of the United States Code).

Saenz, 119 S. Ct. at 1522 n.1.

The State of California instituted the program, including the durational residency requirement, with the use of an "All County Letter" which took effect on April 1, 1997. *Id.* The "All County Letter" detailed a certain harshness to the treatment of former residents. *Id.* at 1523. According to the letter, even if a person or family had resided in California for their entire lives, if they left the state for a period of less than six months their benefits would be based on those of the other state. *Id.*

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[2] *Id.* at 1521. The United States Supreme Court noted that while California ranked sixth overall nationally in benefit levels, with the cost of housing factored in California's rank drops to eighteenth. *Id.* at 1523. The Court also noted that citizens moving to California from forty-three other states would face higher costs of living in California. *Id.* The Court made a direct comparison between neighboring states finding that full benefits for a family of two, including a mother and one child would be $456 per month, while in neighboring Arizona the cash benefit for the same family would only be $275. *Id.* at 1521. The Court also noted a more extreme example of disparities in state aid, finding that a family of four would receive $673 per month in California, but receive only $144 in Mississippi. *Id.* at 1529.

[3] *Id.* at 1522. After implementation, on December 21, 1992, three California residents, eligible for AFDC benefits, filed a related action in the Eastern District of California, *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), challenging the constitutionality of the durational residency requirement. *Id.* Under section 11450.03 of the California Code, each plaintiff's AFDC grant would be substantially lower. *Id.* The district court issued a temporary restraining order and after a hearing issued a preliminary injunction against implementation of the statute. *Id.* The Court of Appeals for the Ninth Circuit summarily affirmed the decision. *Id.* The Supreme Court granted certiorari, but was not able to reach the merits because the approval of the Secretary of Health and Human Services had been invalidated in a separate proceeding, and therefore the judgment was vacated and the case dismissed. *Id.*

[4] *Id.* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA] replaced the Aid to Families with Dependant Children [AFDC] with Temporary Assistance to Needy Families [TANF] and eliminated the requirement that California would need specific approval from the Secretary to implement section 11450.03. *Id.*

[5] *Id.* at 1523. The Court noted that the issues in this action are essentially the same as those made in *Green v. Anderson*. *Id.*

[6] *Id.* The level of aid in Oklahoma was $307 per month in contrast to the aid in California of $565 per month. *Id.*

[7] *Id.* The level of aid in Washington D.C. was $330 per month, while in

II. RELATED LAW

The "right to travel," while not expressly contained in the United States Constitution, is found ingrained throughout our history.[12] Whether the absence of a right to travel was intentional, or a deliberate omission by our founders, is uncertain. However, what is certain is that this omission has been trou-

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California it was $450 per month. *Id.*

[8] *Id.* The injunction was meant to keep the law from going into effect, and countered the effects of the enabling legislation passed by Congress. *Id.*

[9] *Id.* at 1524. The Supreme Court noted that the Ninth Circuit affirmed the issuance of the preliminary injunction without "finally deciding the merits." *Id.*

[10] *Id.* at 1530. The Court noted that the decision of the Ninth Circuit was consistent with decisions of other federal courts, but found that the overall importance of the case warranted the grant of certiorari. *Id.* at 1524.

[11] *Id.* at 1530.

[12] United States v. Guest, 383 U.S. 745, 757 (1966). The United States Supreme Court found the freedom to travel to be necessary to our system of government as a Union although it is not mentioned expressly in the Constitution. *Guest*, 383 U.S. at 758. The Court also made note of the fact that the right to travel has been assigned sources in many parts of the Constitution, but that it was not necessary for them to determine the Constitutional source of such a right that it is generally accepted as existing. *Id. See* MAGNA CARTA Ch. 42 (1215) (stating "[i]n Future it shall be unlawful for any man to leave and return to our Kingdom, unharmed and without fear, by land or water."); ARTICLES OF CONFEDERATION art. IV. para. 1 (1781) (stating "[t]he people of each state shall have free ingress and regress to and from any other state"). *See also* CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 56-67 (1997) (listing Hugo Grotius' famous work of 1615, *De Jure Belli ac Pacis,* which affirms travel as precious and natural human right).

bling for those attempting to interpret the basis for our now accepted right to travel.[13] The right to travel has been recognized as it pertained to international travel as an inherent right to liberty.[14] The right to travel has also been influential in determinating the constitutionality of laws limiting or prohibiting intrastate travel.[15] The right to travel, as interpreted, has also had less direct, but still far-reaching effects, which can be altered by the Court's perception of this unenumerated right.[16]

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[13] *See* Raoul Berger, *Residence Requirements for Welfare and Voting: A Post Mortem*, 42 OHIO ST. L.J. 853, 855, 876-77 (1981). The article outlines the confusion when the Court applies sourceless rights, especially the right to travel which has become established doctrine in the United States over time. *Id.* Founders intended Article IV Privileges and Immunities to include intended "ingress and regress" similar to the language found in the Articles of Confederation, which drafters of the Constitution may have felt would be redundant to include a separate right to travel within the Union clause. *Id.*

[14] *See* Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964). The Court held that a citizen's right to travel abroad is protected as a liberty interest under the Fifth Amendment and should not be infringed upon with arbitrary assignment or denial of passport privileges. *Aptheker*, 378 U.S. at 505. The Court also expanded upon earlier decisions involving passports as strategic tools especially during times of war. *Id.* at 505-06. *See also* Kent v. Dulles, 357 U.S. 116, 125 (1958) (holding that right to travel abroad is important aspect of citizen's liberty protected by Fifth Amendment). *But see* Haig v. Agee, 453 U.S. 280, 306 (1981) (holding that freedom to travel abroad is distinguishable from interstate travel and is subject to "reasonable government regulation" on grounds of "national security and foreign policy considerations"); Zemel v. Rusk, 381 U.S. 1, 15-16 (1965) (holding that denial of passport validation to Cuba did not violate Fifth or First Amendment protections).

[15] *See* Lutz v. City of New York, 899 F.2d 255, 256 (3d Cir. 1990). The court held that a right of intrastate travel does exist and is affected by "cruising" ordinance, but that in this matter the manner of restriction was proper as not to be overburdensome on the right of intrastate travel. *Lutz*, 899 F.2d at 256. *See also* Papachristou v. City of Jacksonville, 405 U.S. 156, 170-71 (1972) (holding that vagrancy laws against citizens can make basic activities illegal, which creates vague standard for citizens and unfettered police discretion towards selective application of law); Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 821 (1992) (noting expansion of right to intrastate travel and its effect on right to travel for indigents and loiterers). *But see* Wright v. City of Jackson, 506 F.2d 900, 901 (5th Cir. 1975) (holding right of intrastate travel not to exist).

[16] Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Prospective*, 23 CAP. U. L. REV. 23, 33 (1994). This article notes the infringement on the constitutionally

A. *Right To Travel: Privileges and Immunities—Article IV*

The first case to discuss the unenumerated right to travel was the famous decision of Judge Bushrod Washington in *Corfield v. Coryell.*[17] The case concerned an action for trespass and the conversion of use of a vessel by the State against an out-of-state resident.[18] While the court held that non-residents could be kept from raking oysters in New Jersey waters, as the waters belonged to the State, in dictum it found that interstate travel itself could not be prohibited due to the Privileges and Immunities protected in Article IV Section 2 of the United States Constitution.[19] The court also set the grounds

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protected right to travel when African-American males are singled out for "interrogation, detainment, arrest, searches, and prosecution," as well as the practice of stopping African-American males at airports and bus stations for routine drug searches. *Id.* The right to travel is infringed upon intrastate when unnecessary detentions of any kind are precipitated by racial prejudice or police "profiling" asserted to be common especially in inner-city neighborhoods where mostly African-Americans live and work. *Id.* at 33-35. See also Heather E. Reser, Comment, *Airline Terrorism: The Effect of Tightened Security on the Right to Travel,* 63 J. AIR L. & COM. 819, 820-23 (1998) (noting that certain security restrictions intended to curtail terrorist attacks also act to limit United States citizens' right to travel); Barbara Ehrenreich, *Battered Welfare Syndrome-Welfare Reforms will cause many women to stay in abusive relationships,* TIME, Apr. 3, 1995, at 82 (noting relationship of certain welfare programs and travel restrictions on women in abusive relationship-type situations). *See generally* CRLP: House Poised to Pass First Federal Criminal Anti-Abortion Measure, U.S. NEWSWIRE, June 29, 1999, *available in* 1999 WL 4637289 (noting relationship between right to travel as interpreted in *Saenz v. Roe* and proposed travel restrictions on minors attempting to obtain abortions under the proposed Chid Custody Protection Act (CCPA) and similar future proposed litigation).

[17] 6 F. Cas. 546 (E.D. Pa. 1823).

[18] *Corfield,* 6 F. Cas. at 546. The actions of the State against the non-resident were pursuant to a statute making it illegal for non-residents to rake any lobster beds in any state waters between certain dates of the year. *Id.*; *see also* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 385-86 (1978) (distinguishing between recreational and livelihood distinctions made by state with regards to non-resident hunters and finding that protection of resources of states is not absolute, though states do have some degree of deference); Toomer v. Witsell, 334 U.S. 385, 397-98 (1948) (holding under Privileges and Immunities Clause state should have deference in identifying local evils and assigning source as peculiar to non-resident).

[19] *Corfield,* 6 F. Cas. at 551-52. The decision is also famous for its determina-

for the Article IV Section 2 Privileges and Immunities Clause to protect more than travel, but also those rights and protections afforded those citizens who had arrived in a new state.[20]

B. The Commerce Clause as a Source of Right To Travel

The issue in *Edwards v. California*[21] was whether a statute that prohibited knowing importation of indigent persons into a state was constitutional.[22] California passed a statute making it illegal for any person to bring a non-resident into California while knowing them to be indigent.[23] The Supreme Court held that a prohibition on the importation of indigents into California violated the Commerce Clause because it exceeded legitimate exercises of a state's police power and unconstitutionally interfered with interstate commerce.[24] The

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tion that Art. IV Sect. 2 Privileges and Immunities Clause must be "fundamental." *Id.* at 551.

[20] *Id.* at 552. The court stated that "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental." *Id. See* Duane W. Shroeder, Comment, *The Right to Travel: In Search of a Constitutional Source,* 55 NEB. L. REV. 117, 117-18 (1975) (noting progression over time of sources used to ground general right to travel: Privileges and Immunities Clause of Art. IV, Privileges or Immunities Clause of Fourteenth Amendment, Commerce Clause, Due Process Clause, Equal Protection Clause). *See also* Paul Ades, Comment, *The Unconstitutionality of 'Antihomeless' Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel,* 77 CAL. L. REV. 595, 605-06 (1989) (explaining relationship between antihomeless and urban camping laws to citizens' right to travel).

[21] 314 U.S. 160 (1941).

[22] *Edwards,* 314 U.S. at 171. The Court recognized the problems associated with large numbers of indigents within the state. *Id.* at 173. These problems include inadequate health care, immorality, and a burden on the state's finances. *Id.*

[23] *Id.* at 171. Appellant was a resident of California who brought a relative into California from Arizona. *Id.* at 170-71.

[24] *Id.* at 177. The Court acknowledged the burden on states when large segments of the population move into the state without any apparent means of support; however, a prohibition on persons entering the state based on indigent status was not a valid exercise of the state's police power. *Id.* at 173-76. The Court

right to travel was later reaffirmed as an unenumerated though vital right afforded to citizens of all states.[25]

C. Right To Travel and Equal Protection

The Supreme Court in *Shapiro v. Thompson*[26] held that residency requirements imposed by the states and the District of Columbia denying welfare benefits for the first year of residency violated the Equal Protection Clause of the Constitution.[27] Justice Brennan found that the residency requirement created two different classes of families distinguished only by length of residency.[28] The Court further held that the resi-

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considered the history of care of the indigent through local and federal welfare and aid programs and recognized the shift of an industrial society away from solely local aid to indigents and those in need. *Id.* at 174. The Court, while recognizing the history and attitudes that shaped the statute, based its determination on the attempt by the State to isolate itself from other states within the overall stream of commerce. *Id. See also* Cleveland v. United States, 329 U.S. 14, 20 (1946) (affirming continued regulation of people as commerce in relation to transport of plural wives by Mormon across state lines); Caminetti v. United States, 242 U.S. 470, 491-92 (1917) (affirming regulation of people as commerce, expanding earlier ruling with regard to transport of women across state lines); Hoke v United States, 227 U.S. 308, 322-23 (1913) (establishing people can be regulated as commerce, upholding statute prohibiting transport of women across state line for immoral purposes).

[25] United States v. Guest, 383 U.S. 745, 758-59 (1966). The Court stated:

> Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. . . . Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.

Guest, 383 U.S. at 758-59 (citations omitted). *See also* Crandall v. Nevada, 73 U.S. 35, 49 (1867) (holding tax to leave Nevada would violate Commerce Clause and right to travel).

[26] 394 U.S. 618 (1969).

[27] *Shapiro*, 394 U.S. at 627. U.S. CONST. amend. XIV, § 1. Equal protection was held to be violated due to the creation of differently treated classes of similarly situated residents. *Id.* at 627. The residency requirement consisted of a one-year wait, similar to that in *Saenz*, for a newly arrived but bona fide resident to receive full benefits. *Id.*

[28] *Id.* at 631-33. The Court found that all persons residing in a state were

dency requirement hindered and thwarted the appellees' exercise of their right to travel.[29] The breadth and applicability of *Shapiro* has been tested over time, and courts continue to hold that durational residency requirements are an unconstitutional burden on the right to travel.[30] Over time the Supreme Court has expanded the protections of the right to travel and Equal Protection espoused in *Shapiro* to include deterrents to migration and settling in a new state although no travel is actually occurring at the point of the violation.[31]

D. *Fourteenth Amendment Privileges or Immunities Clause History*

The Privileges or Immunities Clause of the Fourteenth Amendment created widespread confusion as to the actual

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bona fide residents of the state with the sole distinction being that of time within the state. *Id.* at 632.

[29] *Id.* at 638. *See* James R. Kristy, Note and Comment, *A Showdown Between* Shapiro *and the Personal Responsibility and Work Opportunity Reconciliation Act: Infringement of the Right to Travel*, 20 WHITTIER L. REV. 449, 457 (1998) (noting long-term effects of Shapiro doctrine toward invalidating durational residency requirements).

[30] *See, e.g.,* Zobel v. Williams, 457 U.S. 55, 65 (1982) (holding division of income of state's natural resources based on length of residency violated right to travel); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261-62 (1974) (holding one-year residency requirement for nonemergency medical care violated right to travel); Dunn v. Blumstein, 405 U.S. 330, 340-41 (1972) (holding residency requirement that impeded voting violated right to travel). *See also* Gaddis v. Wyman, 304 F. Supp. 717, 721 (N.D.N.Y. 1969) (holding migrator's intention irrelevant and statute requiring residency unconstitutional on face). *See also* Clark Allen Peterson, Note, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305, 315-16 (1993) (noting recent revival of residency requirements to acquire full benefits for new residents). *But see* Sosna v. Iowa, 419 U.S. 393, 409-10 (1975) (holding one-year requirement to obtain divorce was constitutional and thus did not violate right to travel).

[31] Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 903-04 (1986). The Court stated that

> [o]ur right-to-migrate cases have principally involved the latter, indirect manner of burdening the right [to travel]. More particularly, our recent cases have dealt with state laws that, by classifying residents according to the time they established residence, resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents.

Soto-Lopez, 476 U.S. at 903. (citations omitted).

intent of the original drafters in its application and protections.[32] In the *Slaughter House Cases*,[33] the Supreme Court essentially read the Privileges or Immunities Clause out of the Constitution.[34] Since the *Slaughter House Cases* there has been only one case where the Privileges or Immunities Clause of the Fourteenth Amendment has been used.[35] The use of this Clause was short lived, leaving Due Process and Equal Protection as the only parts of the Fourteenth Amendment to invalidate far reaching state statutes.[36] The application of the *Slaughter House Cases* ruling created a distinction within the courts between national and state citizenship and also distinguished which rights are to be covered under the Privileges or Immunities Clause; this distinction over time has proven somewhat confusing.[37]

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[32] U.S. CONST. amend. XIV, § 1. The Constitution states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Id.* Much of the confusion over this part of the Fourteenth Amendment has been whether or not to confine its application to African-Americans and to the passage and enforcement of the Civil Rights Act of 1866. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992). *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY-THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20-36 (stating that clause meant for Civil Rights Act has been expanded and transformed) *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA 166 (1990) (stating:

> So it has been with the clause of the Fourteenth Amendment prohibiting any state from denying citizens the privileges and immunities of citizens of the United States. That clause has been a mystery since its adoption and in consequence has, quite properly, remained a dead letter. There are, of course, academics who bemoan this . . . on the theory that every part of the Constitution must be used, even if that means judges are writing their own Constitution).

See also Williams v. Fears, 179 U.S. 270, 274 (1900) (stating right to travel secured by Fourteenth Amendment, but not specifying which clause or other constitutional sources).

[33] 83 U.S. 36 (1872).

[34] *Slaughter House*, 83 U.S. at 37. The Court held that the Privileges or Immunities Clause of the Fourteenth Amendment was not applicable and did not provide protections, which has been historically cited by constitutional educators as the point at which the Privileges or Immunities Clause was "read out" of the Constitution. *Id.*

[35] Colgate v. Harvey, 296 U.S. 404, 445-46 (1935), *overruled by* Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940) (holding that Privileges or Immunities Clause of Fourteenth Amendment was violated by income and franchise scheme of Vermont as classification and was not properly related to aims and goals of Act).

[36] *See Madden*, 309 U.S. at 93 (finding that state was not bound by Fourteenth Amendment to over-specific rules of taxation, but entitled to its discretion and judicial deference in the area of taxation; thus, Privileges or Immunities Clause did not invalidate State's tax schemes).

E. Enactment of the Personal Responsibility and Work Opportunity Reconciliation Act and Welfare Reform in the 1990s

Durational residency requirements are not new and can be seen in the history of both the United States and England.[38] Durational residency requirements have resurfaced in the United States due to two main factors: The first is the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA], and the second is the more general public sentiment about the welfare system and welfare recipients.[39] This sentiment has led to the development of the "welfare magnet" theory, which holds that people move from state to state depending on the level of benefits of each individual state.[40] While the motives and intentions of the PRWORA have been criticized and argued, the far-reaching effect is evident.[41] PRWORA's most important position authorizes the states to require new residents, otherwise qualified and eligible for assistance, to wait one year for full benefits.[42] The Act also removes the requirement that states receive a waiver from the Secretary of Health and Human Services before implementing this type of residency requirement.[43] The changes in attitudes toward welfare by the public have also prompted legislators to enact residency requirements slightly different than the *Shapiro* standard in an attempt to circumvent the ruling; these state statutes have, in turn, been reviewed with more and more frequency by American courts.[44]

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[37] Twining v. New Jersey, 211 U.S. 78, 97 (1908). The Court held that the privilege against self-incrimination is not a right of national citizenship, but that the right to travel is such a right. *Twining*, 211 U.S. at 97. *See also Williams* 179 U.S. at 274 (holding "right of locomotion" is right of national citizenship and protected, but tax on recruiters for out-of-state jobs is not violation of citizenship).

[38] Shapiro v. Thompson, 394 U.S. 618, 628 n.7 (1969). The Court in *Shapiro* notes:

> The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges. For example, the preamble of the English Law of Settlement and Removal of 1662 expressly recited the concern. . . [t]he 1662 law and the earlier Elizabethan Poor Law of 1601 were the models adopted by the American Colonies. Newcomers to a city, town, or county who might become public charges were 'warned out' or 'passed on' to the next locality. Initially, the funds for welfare payments were raised by local taxes, and the controversy as to responsibility for particular indigents was between localities in the same State. As States—first alone and then with federal grants—assumed the major responsibility, the contest of nonresponsibility became interstate.

Shapiro, 394 U.S. at 628 n.7. *See also* Smith v. Turner, 48 U.S. (7 How.) 283, 572 (1849) (affirming right to exclude paupers generally); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 101 (1998) (stating changes to welfare systems found in Personal Responsibility and Work Opportunity Reconciliation Act of 1996 indicated similarity with English Poor Laws that show how little "solutions" to poverty have changed over 400 years).

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[39] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604(c) (1996). *See also* Marie A. Failinger, *Keeping Faith: An Essay on the Right to Travel, The Poor and the Ethical Demands of Constitutional Stare Decisis*, 5 LOY. POVERTY L.J. 27 (1999) (stating "[I]n the Personal Work and Responsibility Act (PWRORA), passed as part of President Clinton's pledge to 'end welfare as we know it,' states were nervous about the potential for disarray in welfare benefit levels brought about by devolution were given Congressional permission to reinstate durational residency requirements"); Sylvia A. Law, *Ending Welfare As We Know It,* 49 STAN. L. REV. 471, 474-85 (1997) (book reviews) (noting five common assumptions made about welfare recipients and the poor which can lead to misguided and overreactive legislation: (1) excessive welfare expenditures produce government debt and high taxes; (2) welfare generates dependency and creates a culture of poverty; (3) welfare recipients can get jobs if they try; (4) welfare promotes irresponsible childbearing, especially among teens; and (5) entitlements are socially destructive). *See also* Bernard L. Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions,* 54 CAL. L. REV. 357, 360-66 (1966) (explaining that historically under welfare systems when aid is offered, punitive measures rooted in feelings towards poor people as "nonpersons" are sure to follow).

[40] *Doors Open for the Poor,* L.A. TIMES, May 19, 1999, at B6. This article states that California law overlooks the obviously higher cost of living in the State of California and compares the law to the anti-Okie laws of the past. *Id.* The article expresses that this decision should stand as a warning to states in the future that attempt to save money through unequal treatment of citizens. *Id. See also* Alex Prud'homme, *Learn, Work and Wed: Wisconsin's governor Tommy Thompson offers an imaginative-but controversial-solution to the problems of poverty and welfare dependency,* TIME, Aug. 19, 1991, at 18 (stating that Wisconsin had become "welfare magnet" for those from out of state seeking higher benefits).

[41] *See* Recent Legislation, *Welfare Reform—Punishment of Drug Offenders—Congress Denies Cash Assistance and Food Stamps to Drug Felons—Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 110 HARV. L. REV. 983, 987 (1997) (noting that provision can deny up to 200,000 drug offenders from assistance and have extreme effects); Barbara Vobejda, *135,000 Children to Lose Aid Under New Rules on Disability; Social Security Regulations Cover Welfare Law Changes*, WASH. POST, Feb. 7, 1997, at A02 (stating at least 135,000 children will lose benefits under new scheme).

III. *SAENZ V. ROE*

A. *Opinion of the Court*

In *Saenz v. Roe,*[45] the United States Supreme Court held that a California statute, which limited welfare aid to residents who had lived in the state less than twelve months to the aid they would have received from their prior state of residence, violated section one of the Fourteenth Amendment.[46] The Court held that the "right to travel" was composed of "at least three different components."[47] The Court decided that it was the third component at issue in this case, which has sometimes been called the right to migrate.[48] The Court found that the protections for this "right to migrate" were expressly found in the text of the Fourteenth Amendment.[49] The Court stressed that although the views found in the *Slaughter House Cases* were fundamentally different, it is undisputed that the Privileges or Immunities Clause would apply to this third component of travel.[50] The Court reasoned that the State's assertion that there is no penalty against travel in this situation because new residents receive the same amount they would have received in their previous state of residence is invalid. The classification itself is a penalty.[51] The Court found that the classification is invalid on its face

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[42] 42 U.S.C. § 604(c) (Supp. 1999).

[43] 42 U.S.C. §§ 601, 604 (Supp. 1999).

[44] *See, e.g.,* Mitchell v. Steffen, 504 N.W.2d 198, 203 (Minn. 1993). In *Mitchell,* the court held that a six-month requirement, while less than other residency requirements, burdened the right to travel and violated equal protection. *Mitchell,* 504 N.W.2d at 203. *See also* Eddleman v. Center Township, 723 F. Supp. 85, 92 (S.D. Ind. 1989) (holding three-year state residency requirement and one-year county requirement for full benefits unconstitutional); Jones v. Milwaukee County, 485 N.W.2d 21, 27-28 (Wis. 1992) (finding that state statute does not burden right to travel and is constitutional under rational basis Equal Protection Clause analysis because sixty-day waiting period is much less burdensome than one-year requirement in *Shapiro*). *See also* Joan Biskupic, *Court Weighs Welfare Limits for Newcomers; Challengers Say California Law Violates People's Right to Mobility,* WASH. POST, Jan. 14, 1999, at A03 (noting California Deputy Attorney General Theodore Garelis's argument that California law did not violate *Shapiro* doctrine as California was not denying benefits outright, but only limiting them, and any effect on right to travel was "incidental").

[45] 119 S. Ct. 1518 (1999).

[46] *Saenz,* 119 S. Ct. at 1530.

[47] *Id.* at 1526. The Court stated:

> The "right to travel" discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those who elect to become permanent residents, the right to be treated like other citizens of that state.

Id.

[48] *Id.* The Court held that the right to the "privileges and immunities enjoyed by other citizens of the same state" was inherent as a citizen of both the state and the United States. *Id.*

[49] *Id.* at 156. The Constitution states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

[50] *Saenz*, 119 S. Ct. at 1526. The Court pointed out that the same idea is held in both the majority and minority opinions of *Slaughter House. Id.* In the majority, Justice Miller stated "that a citizen of the United States can, of his own volition, become a citizen of any State in the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Id.* Justice Bradley, writing in the *Slaughter House Cases* dissented, stating, "The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go and reside in any state he chooses, and to claim citizenship therein, and an equality of rights with every other citizen . . . ." *Id.*

[51] *Id.* at 1527. The Court held that this is not a situation where the residents have not proven to be bona fide residents and the distinction is over their status as residents. *Id.* The Court also dismissed any claim that the benefit is portable and not consumed within the state, an argument that has, at times, been made in the cases of in-State college tuition and divorce. *Id.*

and articulated three specific reasons why it may not be justified if its intent is to keep welfare applicants from "migrating" to California.[52] The Court held that this type of durational requirement would allow states to restrict access of new residents from services to which they are equally entitled based solely on their length of residence.[53] The Court next turned to the issue of whether the enactment of PRWORA affects the determination of unconstitutionality of the California statute.[54] The Court found that this question is quickly answered in that Congress cannot authorize the states to violate the Fourteenth Amendment.[55]

B. Chief Justice Rehnquist's Dissenting Opinion

Chief Justice Rehnquist dissented, stating that the Court, in its majority opinion, revives the Fourteenth Amendment Privileges or Immunities Clause.[56] Chief Justice Rehnquist, while not disagreeing with every part of the three-component definition of right to travel, reasoned that the right-to-travel analysis is not appropriate when the person has moved and is no longer "traveling" in any way.[57] The dissent also made an issue out of a state's interest in assuring that only bona fide residents receive the benefits of state citizenship, an interest the dissent felt the majority ignored.[58]

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[52] *Id.* at 1527-28. The Court found that there is no empirical evidence to support the theory that people move to a particular state based on levels of welfare aid. *Id.* Even in the event that this "welfare magnet" theory was true the State of California has stated that this is not the motive behind the legislation. *Id.* Third, even if this was the reason it would be impermissible by precedent. *Id.* As this is the case, the lone explanation for the legislation is budgetary considerations, and the Court found that an across-the-board reduction would achieve the same financial restraint without burdening a single class of equally eligible residents. *Id.* at 1528.

[53] *Id.* The Court noted that parks, schools, and libraries would also be able to be withheld from new residents as well as police and fire protection and many other services based solely on length of residence. *Id.*

[54] *Id.* The Court found and affirmed the potential dangers if any change is made to the long-standing precedent that states cannot be allowed to legislate around the protections created by the three main clauses of the Fourteenth Amendment. *Id.*

[55] *Id.* at 1528-29. The Court also held that regardless of whether Congress could grant states permission to violate the Fourteenth Amendment, the violations would also occur against a right of federal citizenship and the limitations work against the Federal Government as well as that of any individual state. *Id.* at 1528. The Court noted that section 5 of the Fourteenth Amendment gives Congress broad authority to "enforce and command" the Fourteenth Amendment, but that Congress has no power to "restrict, abrogate, or dilute these guarantees." *Id.* at 1529.

[56] *Id.* at 1530 (Rehnquist, C.J., dissenting). The dissent stated that no part of the Constitution would be violated by what is a "reasonable measure," and Chief

C. *Justice Thomas's Dissenting Opinion*

In a dissenting opinion, Justice Thomas argued that it was inappropriate to revive the Privileges or Immunities Clause of the Fourteenth Amendment without taking into consideration the actual intention of the Fourteenth Amendment as well as its "historical underpinnings."[59] The dissent

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Justice Rehnquist was not willing to apply a provision that has been relied upon only once in 130 years. *Id.* (Rehnquist, C.J., dissenting).

[57] *Id.* at 1531. (Rehnquist, C.J., dissenting). The dissent noted that the majority "marries" what it considers to be distinct rights. *Id.* (Rehnquist, C.J., dissenting). The dissent further noted:

> A person is no longer "travelling" in any sense of the word when he finishes his journey to a State which he plans to make his home . . . [t]he right to travel and the right to become a citizen are distinct, their relationship is not reciprocal, and one is not a "component" of the other.

Id. (Rehnquist, C.J., dissenting).

[58] *Id.* at 1533 (Rehnquist, C.J., dissenting). The dissenting opinion stressed that states have a valid interest in "ferret[ing] out those who intend to take the privileges and run." *Id.* (Rehnquist, C.J., dissenting). It noted a distinction in those in the state solely to receive its benefits and those intending to remain and not simply take advantage of benefits restricted to residents. *Id.* (Rehnquist, C.J., dissenting). The dissent noted examples of Court decisions that found a type of "portability" of services, which would allow the state to mandate duration requirements. *Id.* (Rehnquist, C.J., dissenting) (citing Starns v. Malkerson, 401 U.S. 985, 986 (1971) (holding durational requirement valid for in-state tuition determination). *See* Sosna v. Iowa, 419 U.S. 393, 409-10 (1975) (holding durational residency requirement valid for obtaining divorce).

[59] *Id.* at 1535-38 (Thomas, J., dissenting). Justice Thomas emphasizes the actual intention of the Fourteenth Amendment at the time of its enactment, stating:

> [T]he majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits appears contrary to the original understanding and is dubious at

also took exception to the use of the Clause because it has been considered dead letter law for some time, and it considered the manner in which the majority "breathe[s] new life into the Clause," to be without sufficient forethought.[60] Justice Thomas also strongly warned that the Privileges or Immunities Clause could become, like other parts of the Fourteenth Amendment, a "convenient tool for inventing new rights" based on the whim of the sitting members of the Supreme Court.[61]

IV. DISCUSSION

In *Saenz v. Roe,* the Supreme Court revived the Fourteenth Amendment Privileges or Immunities Clause that had been dead-letter law since the *Slaughter House Cases.*[62] Moreover, the Court took another step in the history and development of the right to travel by definitively adding the right to migrate to this broader right.[63] The Court also took a definitive step to reveal a source within the Constitution for the historically elusive right to travel.[64] The Court reaf-

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best.

Id. at 1538 (Thomas, J., dissenting).

[60] *Id.* at 1535-38 (Thomas, J., dissenting). The Justice noted "it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case." *Id.* at 1538. (Thomas, J., dissenting). "Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its mean in an appropriate case." *Id.*

[61] *Id.* (Thomas, J., dissenting). According to Justice Thomas, the confusion over Fourteenth Amendment jurisprudence is greatly affected by the initial demise of the Privileges or Immunities Clause, but he indicated that without the requisite thought and evaluation of historical factors and the original meaning of the Clause, revisiting the Privileges or Immunities Clause might only add to the confusion. *Id.* (Thomas, J., dissenting).

[62] *See supra* notes 46-47 and accompanying text. The Court upheld the decision of the lower court and its injunctive ruling, stating that the case was consistent. *See supra* notes 9-10 and accompanying text.

[63] *See supra* note 31 and accompanying text. The Court used a three-component test to apply the right to travel naming as the third component the right to migrate and applying the right to travel in situations where actual travel has ended. *See supra* note 44 and accompanying text.

[64] *See supra* notes 13-14, 20, 25 and accompanying text. The Court rooted the

firmed, although using a different Constitutional source, the *Shapiro* doctrine that had meant the end of durational residency requirements and had more recently begun to be tested by States finding small distinctions in an attempt to circumvent the ruling.[65] The Court also reaffirmed its holdings that Congress cannot, through legislation, allow states to violate the Fourteenth Amendment.[66]

The dissenting Justices did not recognize the third component of the majority's right to travel analysis. The dissenting Justices found the application of the protections of the right to travel to be a separate and distinct right and outside of the protections of the right to travel doctrine.[67] Both dissenting Justices called into question the majority's revival of the Privileges or Immunities Clause after an extended period of time and its applicability to the case at hand.[68] The dissenting Justices also warned against the revival of the Privileges or Immunities Clause and its potential to be utilized as a subjective tool by sitting members of the Court to invent new rights

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right to travel, including migration, mainly in the Privileges or Immunities Clause of the Fourteenth Amendment and noted that the death of this clause was not applicable in this situation since the Privileges or Immunities Clause expressly forbids such state action. *See supra* note 48 and accompanying text.

[65] *See supra* notes 26, 29 and accompanying text. The Court did not find compelling the "portability" distinction found in some of the residency requirements based on marriage and in-state tuition in this situation. *See supra* note 49 and accompanying text.

[66] *See supra* notes 52, 53, 54 and accompanying text. The Court noted that the Citizenship Clause expressly equates residency with citizenship and does not allow for degrees of citizenship. *See supra* notes 52, 53, 54 and accompanying text.

[67] *See supra* note 55 and accompanying text. Rehnquist did not disagree with the right to travel generally, or the first two components of the majority's test, but did not feel that the third component of migration should be added since it is separate and distinct. *See supra* note 55 and accompanying text.

[68] *See supra* notes 54, 58 and accompanying text. The dissenting Justices also called into question the use of Fourteenth Amendment Privileges or Immunities Clause in light of the recognized fact of confusion over its intention. *See supra* note 57 and accompanying text. The length of time since its last use made the dissent question the soundness of the Court's ruling and application. *See supra* note 57 and accompanying text.

and draw upon themselves the common criticisms of judicial activism and legislating from the bench.[69]

The revisitation by the Court into the use of Privileges or Immunities to invalidate a state statute will, most likely, set the stage for a murky trek through the muddy waters of Fourteenth Amendment jurisprudence and will serve as a new Clause from which to revisit the never-settled arguments over original intent, judicial activism, and the use of over-expansive readings of Civil War law to achieve the Court's social agenda.[70] What the case says with regards to a California welfare statute can be immediately analyzed, but what the case actually means will be decided in the future most likely through the hindsight of future rulings. This case is either the next *Griswold v. Connecticut*[71] or *Lochner v. New York*[72] and will be cited endlessly in Constitutional Law classes as the benchmark case of the Court's use of Privileges or Immunities for years to come, or it will be quickly overruled similar to the Court's last visit to this historically invisible Clause in 1935 and 1940.[73]

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[69] *See supra* note 59 and accompanying text. Justice Thomas feared abuse of this newly revived clause. The dissent stated that the original reading out of the Constitution which constructively occurred in the *Slaughter House Cases* added to the myriad of confusion over the intention and proper application of the Fourteenth Amendment and a return to Privileges or Immunities as a means to invalidate legislation without the proper forethought would lead to added confusion. *See supra* notes 57, 59 and accompanying text.

[70] *See supra* notes 59, 60 and accompanying text. It is interesting to note that although the decision in this case was 7-2, Justice Thomas stated in his dissent that he was willing to consider the application of the Privileges or Immunities Clause of the Fourteenth Amendment "in the appropriate case." This language in his dissent gives a strong indication that almost all of the Justices on the current Supreme Court would be willing to assert and apply the Privileges or Immunities Clause to invalidate state statutes in certain circumstances; with eight members of the Court open to this type of application, the Privileges or Immunities Clause could be seen as viable regardless of changes in the Court's membership in the near future. *See supra* notes 59, 60. *See generally* David G. Savage, 85 A.B.A. J. 36 (1999) (stating "[l]egal academics on the left and right had urged the Court to take a new look at the old wording of the clause, as well as its history. They disagree, however, on where this might lead"). The decision has already started some rumblings of landmark cases that may be affected by the recent decision in *Saenz*. *Id.* at 37. Savage wrote that "[t]he privileges and immunities clause was intended to protect fundamental rights that were deeply rooted in the customs and traditions of the country. . . '[a]s one example, I think *Roe v. Wade* is an impossible decision to justify under a privileges and immunities analysis.'" *Id.*

[71] 381 U.S. 479 (1965).

[72] 198 U.S. 45 (1905).

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[73] *See supra* notes 35-36 and accompanying text. *See* John Yoo, *The Supreme Court Rediscovers an Old Clause*, WALL ST. J., May 24, 1999, at A31 (stating "[l]iberals academics and lawyers are already rushing to embrace *Saenz* because they hope to rejuvenate their quest to use the Constitution to promote their visions of social justice"). Arguably, this expansive use of the Privileges or Immunities Clause of the Fourteenth Amendment will not occur as it did with the other sections of the Fourteenth Amendment because of historic evidence. *Id.* However, "they need not have worried. Unlike its Due Process and Equal Protection sisters, the Privileges and Immunities Clause should prove easier to cabin. Historical evidence about the clause's original understanding shows that its framers did not believe that it would promote sweeping social rights." *Id. See generally* Savage, *supra* note 70, at 37 (stating that "[s]cholars hailed the opinion as a landmark because it recast the 14th Amendment to fit its original meaning" and "'[t]his turns the 14th Amendment right side up,' says Duke law professor Walter Dellinger, a former solicitor general"). One of the most dramatic proposed effects of the renewal of use of the Privileges or Immunities Clause is the possible effect it could have on the incorporation of the Bill of Rights to the states that is tagged as the "incorporation clause." Akhil Reed Amar, *Lost Clause*, THE NEW REPUBLIC, June 14, 1999, *available in* 1999 WL 7251829. Moreover,

> [p]roperly construed, the key clause of the Fourteenth Amendment goes beyond the principle of antidiscrimination; it also has a more absolute, fundamental rights core. The language that no state shall make a law that abridges the various privileges and immunities echoes not just Article IV, but also Amendment I. . . More generally, the clause aimed to affirm that no state could deny its citizens any fundamental right of freedom, privilege or immunity.
>
> This opens up a huge can of worms: How, after all, are judges to decide which "privileges" and "immunities" are that fundamental? Following Saenz's methodological lead of construing scattered clauses as part of a single document, the first place to look is elsewhere in the Constitution. Where other parts of the Constitution declare certain rights and freedoms—like freedom of speech and religion, or the right to habeas corpus and jury trial—these rights are indeed fundamental privileges that no state should abridge. This is the basic idea underlying the so-called "incorporation" of the Bill of Rights against the states.
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> Having rediscovered an important part of our constitutional heritage, will the Court in future cases insist on claiming all this territory for itself, or will it prove more willing to share authority with Congress? In these respects, *Saenz* raises as many questions as it answers.

Id.

V. CONCLUSION

Saenz v. Roe revives the long-dead Privileges or Immunities Clause of the Fourteenth Amendment. It takes a definite step in holding durational residency requirements unconstitutional, while at the same time grounding the historically elusive right to travel within another express part of the Constitution. Its meaning and effect are not immediately clear. It has the potential to be a landmark case and propel this revived Clause to the same level of use and controversy that Due Process and Equal Protection have experienced, or it could be a one-time revival of this sleepy Clause, which the Court finds applicable only to durational residency requirements. Regardless, this case speaks to the relationship between the people, as citizens, and the government and the relationship between the state and federal governments in our Union as a federalist system.

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